No. 245.

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JAMES H. McKENNEY, Clerk.

Brf. of Hamline & Scott for Respts

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

Filed April 10, 1901.

NO. 245.

Henry Clews et al. *vs.* Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, Co-partners, and Edwin G. Foreman and Charles Henrotin et al., composing the Governing Committee of the Chicago Stock Exchange, *Respondents.*	Certiorari to the Circuit Court of Appeals, Seventh Circuit.

BRIEF FOR THE RESPONDENTS

EDWIN G. FOREMAN AND CHARLES HENROTIN ET AL., COMPOSING THE GOVERNING COMMITTEE OF THE CHICAGO STOCK EXCHANGE.

JOHN H. HAMLINE,
FRANK H. SCOTT,
FRANK E. LORD,
SOLICITORS FOR SAID RESPONDENTS.

JOHN H. HAMLINE,
OF COUNSEL.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

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BRIEF FOR THE RESPONDENTS EDWIN G. FOREMAN AND CHARLES HENROTIN ET AL., COMPOSING THE GOVERNING COMMITTEE OF THE CHICAGO STOCK EXCHANGE.

"He likewise did much for the improvement of commercial law in this country, by rearing a body of special jurymen at Guild Hall, who were generally returned in all commercial cases to be tried there. He was on terms of the most familiar intercourse with them, not only conversing fully with them in court, but inviting them to dine with him. *From them he learned the usages of trade.*"

Sketch of Lord Mansfield, 3 Campbell's Chief Justices of England, p. 304, foot note 2.

STATEMENT OF CASE.

In this case the respondents, Edwin G. Foreman *et al.*, comprising the Governing Committee of the Chicago Stock Exchange, hold in their possession $14,000 in margins. Seven thousand dollars of this amount was placed there by Schwartz, Dupee & Co., brokers on the Chicago Stock Exchange, as agents for the petitioners, Henry Clews & Co., of New York; and $7,000 thereof was placed in their hands by the respondents, Jamieson & Co., brokers on the Chicago Stock Exchange. These sums were paid by said parties in accordance with the rules of the Chicago Stock Exchange to secure the performance of the contract of Jamieson & Co. to purchase 700 shares of Diamond Match stock from petitioners' brokers, Schwartz, Dupee & Co. The payments and said contract are all the result of certain orders given by Clews & Co. to said Schwartz, Dupee & Co. to sell said shares "for the account," through the agency of the Clearing House of the Chicago Stock Exchange. These orders we will presently explain. Suffice it now to say that Clews & Co. filed their bill in the United States Circuit Court for the Northern District of Illinois against said Jamieson & Co. and the Governing Committee of said Stock Exchange, as well as against Schwartz, Dupee & Co., charging that in the month of July, 1896, complainants had ordered their said Chicago brokers to sell on the Chicago Stock Exchange, according to the rules of said exchange, 700 shares of Diamond Match Company stock for delivery August 31, 1896; and that on August 3, 1896, said brokers sold to the defendants Jamieson & Co.

1,150 shares of said stock and contracted to deliver them on August 31, 1896, to Jamieson & Co., or such persons as might, under the rules of the exchange, be substituted therefor, and that Jamieson & Co. contracted to receive said stock at said date and pay therefor $222 per share; that while said sale of 1,150 shares was made in the name of Schwartz, Dupee & Co., as to 700 of said shares they were acting for and in behalf of complainants, while, as to the remaining 450 shares, they were acting in behalf of other clients of theirs.

The bill charges that Jamieson & Co. had refused to take said 700 shares of Diamond Match stock, although the same were tendered to them on delivery day by complainants; that subsequently, and by reason of said default, the shares were sold in the market at $130 a share, and as a result thereof complainants sustained a loss of $64,400.

The bill further charges that the Governing Committee of said Exchange has in its possession said trust fund of $14,000, put up as margins by the respective parties to said contract; that Jamieson & Co. refuse to permit the Stock Exchange to pay said trust fund over to complainants, and the latter pray for an accounting with Jamieson & Co., and that the said committee be decreed to pay said trust fund over to the complainants, and that Jamieson & Co. be decreed to pay to the complainants said $64,400, less $7,000 of said trust fund. (Transcript, pp. 54–59.) We will not repeat the history of the pleading. Suffice it to say that after answers were filed by all the defendants and the case was put at issue it was referred to Master in Chancery Sherman to take evidence and report his conclusions, and later on the master reported thereon in favor of the complainants; he holding that the

governing committee should pay to the complainants said trust fund of $14,000, and the defendants Jamieson & Co. should pay to the complainants said sum of $64,400, less $7,000 of said defendants' money to be paid by the Governing Committee as aforesaid. (Transcript, pp. 29–50.)

Upon exceptions to the master's report filed by Jamieson & Co., Judge Grosscup dismissed the bill for lack of equity. In the opinion he filed he announced that while an enforceable contract was entered into between Schwartz, Dupee & Co. and Jamieson & Co. for 700 shares of Diamond Match stock to be taken by Jamieson & Co. at $222 per share on the 31st day of August, 1896, from Schwartz, Dupee & Co., and while their undisclosed principals might enforce any contract said brokers made for them, yet inasmuch as Clews & Co. had authorized a sale of 700 shares of Diamond Match only at $229 per share, their brokers had no authority to sell for $222 her share, and therefore Clews & Co. were not bound by the contract Schwartz, Dupee & Co. had entered into for them. He also held that if the contract could not be enforced against Clews & Co. it could not be enforced in their favor on account of lack of mutuality. While the court recognized that parties who were brought together by means of the Clearing House system and their principals were in privity where the terms of the original order were carried out, nevertheless he held the Clearing House system, under which Jamieson & Co. became substituted as purchasers of the stocks Clews & Co. had ordered Schwartz, Dupee & Co. to sell for them, could not change so important a feature of Clews & Co.'s contract as the price, without their conscious assent. (Trans., pp. 80–83.)

As we shall presently show in explaining the Clearing House, Judge Grosscup did not understand it at all, and his claim that Clews & Co. were not to receive $229 a share by virtue of their brokers' action is directly contrary to the facts. However, on appeal from this decree, the United States Circuit Court of Appeals for the Seventh Circuit paid no attention to Judge Grosscup's opinion, or the grounds therefor; but assuming that there was privity between Clews & Co. and Jamieson & Co. and a contract existed between them, yet on their own initiative held that instead of its being a contract for a *bona fide* purchase and sale of stock, it was either a mere wagering transaction or a contract in options. (Trans., pp. 156–161.)

This opinion is due to that court's misunderstanding the real facts in the case, the true nature of the Clearing House of the Chicago Stock Exchange and the contracts there entered into. The decision of Judge Grosscup, if followed, destroys the Clearing House system which prevails in all the exchanges of the world, by preventing the customer from enforcing the contracts his broker makes for him. The opinion of the Court of Appeals puts the stamp of gambling on all contracts for future delivery on stock exchanges. Now, it is a matter of entire indifference to the Chicago Stock Exchange and its Governing Committee to whom they pay the $14,000 which they hold in their hands. It is true that if this decree is not reversed, they would then be liable to another action by Schwartz, Dupee & Co. as well as by Jamieson & Co. for the moneys in their hands. It is also true that in order to avoid a multiplicity of suits, it is highly desirable that a final decree be entered in this case directing said Governing Committee what to do with this money which

they hold and which does not belong to them. But the real reason for their acquiescing in the petition for *certiorari* and inviting the review of the rulings of the lower courts is this: So long as the opinion of the United States Circuit Court of Appeals for the Seventh Circuit stands unreversed, just so long can any non-resident who trades in the account on the Chicago Stock Exchange escape carrying out his contract by setting up that the transaction has been held to be gambling by the court of last resort in that jurisdiction for cases of this nature. Inasmuch as said Court of Appeals discussed and decided that question without the point being raised by the pleadings, the decree of the lower court, or the briefs of counsel, we feel justified in asking this court, no matter whether it affirms or reverses the decree, to consider and pass upon such question, so that if this court should be of opinion that the transaction in question is not gambling, it will say so, and permit trading upon the stock exchanges of this country to be freed from the cloud said opinion casts upon it. And this is no idle request.

The writer recalls hearing Judge Taft read a paper before the American Bar Association at Detroit in 1895 in which he stated that seven-eighths of the active capital of this country had assumed the corporate form. (18 Reports American Bar Association, 243.) Since that time corporations have so engrossed the business and property of the country that it is not far from the mark to say that the entire active capital of the country is practically represented by the stocks of corporations. Within a short time so great facilities have been afforded by the laws of some of the states for the consolidations of corporations, that now probably less than fifty gigantic corporations carry on the business formerly carried on by thou-

sands of corporations. The result has been to more and more throw upon the stock exchanges of the country the function of affording safe, quick and sure markets for the transfers of the capital of these corporations. When the capital stock of these corporations changes hands, the active capital of the country changes owners. The capital stock of these corporations are the evidences of title to and ownership of a large portion of the property of the country. The sole public market for these stocks are the stock exchanges of the large cities. Hence, anything that checks the quick and safe transfer of these stocks upon said exchanges or that renders contracts respecting their sale on said exchanges insecure, is a clog on commerce and a burden upon the capital of the country. The decision of the United States Circuit Court of Appeals for the Seventh Circuit, if allowed to stand, seriously menaces the work of such exchanges. Similar reasons exist for asking you to consider and determine whether the stock exchanges shall be deprived of the benefits of the Clearing House system by the opinion of Judge Grosscup. It is because the judges of the lower court failed to understand the rules and usages of the Stock Exchange as did the parties, that we call the attention of this court to the practice of Lord Mansfield. The principles which we respectfully submit should govern the determination of such questions is that employed by Lord Mansfield in *Heylyr* v. *Adamson*, 2 Burr, 669, in promulgating the rules which now govern bills of exchange:

"I cannot persuade myself that there has really been such a variety of opinions on this subject; but, however that may be, it must now be determined *by the nature of the transaction, general convenience, and mercantile usage.*"

The propositions of law which should govern these transactions will instantly be apprehended by the court as soon as the facts are clearly stated. But the facts to which they should be applied, though simple when explained, appear to be extremely complicated and are easily misunderstood by anyone who has never attempted to buy stocks or products at the great markets of the land.

With your permission, we will explain in detail just how the transactions here involved took place, and their real character.

During the year 1896, and for a long time prior thereto, our co-defendants, Schwartz, Dupee & Co., were brokers in stocks and bonds in Chicago, and members of the Chicago Stock Exchange. They had been for many years the Chicago correspondents of the well-known New York brokerage house of Henry Clews & Co. (Trans., p. 98.) The latter were then, as now, stock brokers in New York City and the New York correspondents of Schwartz, Dupee & Co. (Trans., p. 100.)

The Chicago Stock Exchange is a voluntary association of brokers, organized for the purpose of furnishing a Chicago market for stocks, bonds and other collaterals listed on that exchange. The exchange has a trading room in a building named after it in the City of Chicago, and local stocks, bonds and securities have their sole public market on the floor of said exchange. (Trans., p. 107.) This market is conducted in the following manner: At 10 o'clock in the forenoon of each business day, Joseph R. Wilkins, the chairman of said exchange, calls off the official printed list of securities, stocks and bonds, listed on said exchange, and anybody that wants

to buy anything on the list makes a bid, and anybody who wants to sell anything so listed makes an offer. When any bid or offer is accepted, the sale so made is entered by a clerk of the exchange under the directions of Mr. Wilkins. When that call is over, an irregular session is had, during which trades are arranged but no call made, which lasts until half past 1. At that hour Wilkins makes another call, which is confined to the different stocks that are in the Clearing House of the said exchange, a description of which Clearing House we will presently give. The last price bid for a stock before Wilkins brings down his gavel at the close of this call is the Clearing House price of that stock for that day. At 2 o'clock each day the exchange adjourns. (Trans., pp. 107-116.)

As no one but members of the exchange are permitted to deal on the floor of the exchange, outsiders like you or I or Clews & Co. have to employ a member of the exchange to carry out our orders at this market. All transactions of buying and selling must take place between members of said exchange, the principals of the brokers being as a rule unknown in the transaction. The trading is either for immediate or future delivery. In cash trades or immediate deliveries all stocks and securities sold are required by the rules of said exchange to be delivered before 1:30 o'clock of that day. In the case of stocks sold for future delivery, the securities are required by the rules of the board to be delivered on the last day of the month in which the contract is made. That day is known as the delivery day for that month. (Trans., p. 110.)

In July and August, 1896, the Diamond Match Company's stock was one of the stocks listed upon said ex-

change. (Trans., p. 108.) At that time, and during the events herein referred to, the defendants Jamieson & Co. were stock brokers in the Chicago Stock Exchange, and Mr. Jamieson, the senior member of that firm, was president of the Chicago Stock Exchange, and by virtue of his office chairman of the Governing Committee thereof. (Art. VI, Constitution; Trans., p. 120.)

July 16, 1896, at 11:19 A. M., Schwartz, Dupee & Co., in Chicago, received the following order from H. Clews & Co. in New York, by wire, to-wit:

"Sell 500 Diamond Match at 220½ *for* ⁰/꜀
(Signed) H. CLEWS & Co."

On the 20th of July, 1896, at 9:23 A. M., the same parties received another order from Clews & Co., as follows:

"Sell 200 Diamond Match at 221 *for the account* at opening of market. They want put out at opening if possible but it is good all day.
(Signed) CLEWS."
(Trans., p. 103.)

If you or I were present when these dispatches were received we would know therefrom that Clews & Co. wanted their Chicago correspondent to sell Diamond Match stock in the Chicago market at a certain price. We would probably know that the only market for said stock was the Chicago Stock Exchange, and that that was the market on the opening of which Clews ordered the 200 shares sold. We would also know that Clews & Co., having directed their agent to go into that market and make the sale, intended that such sale should be made with reference to the rules and customs of said market. But we would not know for the life of us what Clews & Co. meant by ordering the stock sold "for the account,"

or in what manner the Chicago brokers were to execute orders of this kind for Clews & Co. To find out what Clews & Co. meant by the words "for the account" we would have to inquire at the market where the sale was ordered made. Had we done so we would have found that the rules of the Chicago Stock Exchange furnished an elaborate scheme for trading "for the account," and that all trades "for the account" had to be made in conformity with the Clearing House rules of said exchange. When we became acquainted with those rules and learned how they were carried out, we would, for the first time, be able to translate the technical language employed by Clews & Co., and learn what Clews & Co. meant by ordering Schwartz, Dupee & Co. to sell "for the account." We would have learned from these rules not only that all sales of stock "for the account" had to be made under the rules of the Clearing House of said exchange (Sec. 1), but the stock must be delivered on the last day of the month. (Sec. 2.) (Trans., p. 125.)

We know, without being told, that if Schwartz, Dupee & Co. had only one contract for a principal to sell and had made only one contract for another principal to buy, they would require from the buying principal that he should take the shares sold, and from the selling principal that he should supply the buying principal with the shares bought. But if they have a large business, many customers, some buying, others selling, or if they carry trades over, it is plain that these brokers would, on behalf of their customers, seek to devise some way for a transfer of the balance of such shares only.

We also know, without being told, that Clews & Co.'s brokers, if they had much business, might in the interval before the delivery day have bought the same kind of

stock for one client and sold it for another. Many other brokers might have sold and bought the same kind of stock and the same brokers might have had reciprocal dealings with Shwartz, Dupee & Co. and with each other. To obviate the needless expense, trouble and risk of daily putting up margins on allthese transactions with each other and making actual transfers of stock for each transaction, and paying by checks on delivery day, we would find on inquiry that the rules of the Stock Exchange had created the machinery of the Clearing House, by means of which each member so dealing after clearing with himself daily clears with his fellows. To accomplish this the rules require each member who, on any given day, buys or sells stock "for the account," to prepare a statement setting out all purchases and sales that day made by him on blanks furnished by the manager of the Clearing House, and to deliver the same, properly filled out, balanced and signed to said manager before 9:45 A. M. (Sec. 3.) If the broker's sales and purchases of the same stock are shown to be the same in amount he no longer needs the intervention of the Clearing House to clear his stocks, and so goes out of the house with that stock until he buys or sells some more. But if the contract for sales of a certain stock which the broker has made exceeds his contracts for purchases of the same stock, then the manager of the Clearing House is authorized by the rules to find some party or parties who have a balance of excess stock bought, and substitute this party as the purchaser from the seller for excess stock sold instead of the original purchaser. (Sec. 5.) This process is kept up every day until "delivery day" for that month's account. Upon delivery day the party then found to be substituted by the manager of the Clearing

House as purchaser, instead of the original purchaser, takes and pays for the stock so originally sold. See 6]Transcript, p. 126].

All exchanges require, and it is the essence of all contracts for future delivery that margins to secure the performance of the contract be put up by both sides to the contract. The propriety of requiring some such security is obvious and its legality has never been questioned.

To furnish this security, section 12 of these rules requires a margin of $10 a share of par value of $100 or over to be deposited with the Clearing House on all stocks traded in the Clearing House. These margins are by section 13 considered as a margin or part of a margin required by section 1 of article XVI of the by-laws to be kept up on trades outside of the Clearing House. But if 100 shares of Diamond Match be sold to-day at par for future delivery, or $10,000, and each side puts up ten points, or $1,000 each, it is plainthat if the stock goes down eleven points to-morrow, so that the stock which the seller has is worth but $8,900, then the stock itself and the $1,000 margin put up by the buyer is not sufficient security to the seller for his contract under which he expects to get $10,000 from the buyer. To provide for keeping this margin good to meet such declines said Sec. 1, of Art. XVI requires that whenever the market price of the securities shall change so as to reduce the margin of either party below $10 per share, par $100, either party may call for a deposit sufficient to restore the margin to $10, and this may repeated as often as the margin may be reduced. On the contrary, the $1,000 in the case supposed which the seller has up is more than sufficient security for the buyer on the basis of seller having up ten points

as security against his default. It follows that there is no need for seller to keep that extra point up as margin, and he is permitted to withdraw it, leaving the trade still margined ten points on the value. This system is daily enforced in the Clearing House. The result is that when Clews & Co. ordered 500 shares sold at $220\frac{1}{2}$ on July 16, 1896, their brokers had to put up in the Clearing House for them $5,000 as margins, and when they ordered 200 shares more sold on the 20th they had to put up $2,000 more. Now, if the price of that stock went up a point, there not being enough margins up by Clews & Co. to keep the $10 a share par value, it would be necessary for Clews & Co.'s brokers to put up $500. For the same reason, upon the going down of the stock, while the other party to the contract would have to put up $500 more of his money so as to secure the fulfillment of his contract, Clews & Co. would be permitted to withdraw of their margins $500, or just the amount the other party is required to pay. When such extra margin is due from the seller he is required by section 3 to give his check to the manager of the Clearing House for that amount. At the same time the buyer draws a draft in his own favor, upon the bank designated by the Clearing House, and the draft if approved by the manager is accepted by said bank, and then returned by the manager to the buyer, all as provided in Sec. 4. (Trans., p. 126.) In this way the margins required are always kept in the Clearing House. In order to make the Clearing House system work, and to clear the stocks therein, all stocks go in every morning at the price fixed daily by Wilkins, the manager of the Clearing House at his 1:30 call of the day before. (Trans., p. 115.)

The result is that if the 500 shares of stock went

into the Clearing House at 221½ on the 16th of July, and kept going down, margins would be daily paid in by the buyer as fast as the price went down and daily taken out from the Clearing House by the broker for Clews & Co. It follows that if by July delivery day Match had gone down to 200, Schwartz, Dupee & Co. would have in the interim received for Clews & Co. the difference between 221½ and 200, at which price the substituted buyer would take it, and Clews & Co. would by the July delivery day get $21.50 per share out of the Clearing House and on the delivery day get $200 more a share, or their contract price of 221½ for the stock they had ordered sold.

Now, this is what we would find Schwartz, Dupee & Co. were ordered to do when in July Clews & Co. ordered them to sell "for the account" 700 shares of Diamond Match on the Chicago Stock Exchange.

The stipulation of the parties upon the trial of the case reads as folloms:

"It is further stipulated that the orders of Henry Clews & Co. to Schwartz, Dupee & Co. contained in said messages were as a matter of fact executed as set forth in the aforesaid messages from Schwartz, Dupee & Co. in the Chicago Stock Exchange." (Trans., p. 104.)

These messages report what the Chicago brokers did with Clews & Co.'s orders.

On July 16, 1896, at 11:35 A. M., Schwartz, Dupee & Co. wired Clews & Co. in response to their first order:

"Sold 500 Diamond Match at 221½ *for the account.*
(Signed) SCHWARTZ, DUPEE & CO."

And on July 20, 1896, at 10:08 A. M., they telegraphed to Clews & Co. in response to the second order:

"Sold 200 Diamond Match 221½ *for the account.*
(Signed) SCHWARTZ, DUPEE & CO."

There is no question then but that Schwartz, Dupee & Co. did what Clews & Co. ordered them to do. (Trans., p. 103.)

Clews & Co. are certainly presumed to have intended to have Schwartz, Dupee & Co. do the very thing they ordered them to do. If they had ordered the latter to kill a man and the latter did it, Clews & Co., or anyone else, would not be heard to say that they did not intend the necessary result of their own order, and if they ordered them to kill a man by guillotining him, for like reasons, they could not be heard to say they did not know that a guillotine cut a man's head off. In like manner, when they told Schwartz. Dupee & Co. to sell Diamond Match on the Chicago Stock Exchange "*for the account*" the latter had to carry out the order in the manner called for by the dispatch. As the latter were members of the Chicago Stock Exchange, the order was as well understood by them as though they had been ordered to sell pork or dry goods.

It follows that the question does not arise in this case whether Clews & Co. knew about trading "for the account" in the Chicago Stock Exchange, for it is the very thing they ordered done.

In fine, Clews & Co. made these orders, and Schwartz, Dupee & Co. accepted their execution with reference to all the rules and customs of the Chicago Stock Exchange governing trading in the account, and they all form a part of the contract Clews & Co. ordered made.

But it frequently happens on exchanges that before the day arrives for delivery of the stock, the seller or buyer desires to postpone the delivery for another month; the buyer may not be ready to

pay for it and wants it carried over for a month. The most complicated way to do this would be for him to find some one who for a consideration is willing to buy the stock on the delivery day and hold it for him for another month, charging him interest or compensation for the favor and for the money employed, the first buyer engaging at the end of that time to take possession of the stock and repay the money. But a simpler way is to go to the seller and pay him interest or carrying charges to *make a new contract* for the next month's delivery. This premium is added to the price of sale for the current account and makes the actual buying price for the next account larger by that amount. This premium or charge is regulated by the nature of the security, by the value of the money, by the demand existing for the accommodation, and by the credit of the person seeking the accommodation. This practice of carrying over has long obtained in England, from whence we got the idea of the stock exchange and clearing house. In that country the consideration paid by the buyer to the seller who agrees to postpone delivery is called "contango." When the seller pays the premium for the carrying over his trade, it is called "backwardation." The process of carrying over is described by Melscheimer and Laurence in their treatise on the laws and customs of the London Stock Exchange at page 10, as follows:

"The vendor of the stock (in consideration of a payment made to him by the buyer) enters into two contracts with the buyer—one a contract for the purchase of the same amount of stock as he has contracted to sell (such contract to be completed on the settling day so as to cancel the subsisting contract), and the other a fresh contract for the sale of the same amount of stock

to be completed on the subsequent settling day. The result is that the vendor and purchaser stand in precisely the same position as if there had been no previous contract (except as regards payment of the consideration), because the difference between the original contract price and the price at which the carrying over is effected must be paid at once—that is to say, on the settling day. The nominal price of the security at which the carrying over is effected would obviously be quite immaterial to the parties, since the two contracts balance one another, were it not that this difference is payable immediately. Being payable immediately, more bargaining would become necessary to fix the price for the new contracts; but this is obviated by the publication of a list of 'making-up prices,' which are, in round figures, the approximate values of all the recognized securities on that day, as settled by the clerks of the house in the various markets, and are usually based upon the average price of the first two or three hours of the day. In case of any dispute as to the making-up prices, or of any omission in fixing them, the clerk acts upon the decision of two members of the committee. All continuations must be effected at these prices, or, where no such prices have been fixed, at the then existing market price.

"The consideration thus paid by the buyer, for which the vendor agrees to postpone the delivery of the stock he has sold to a future specified date, is called a '*contango*'; on the other hand, a "*backwardation*' is the premium paid by a seller of stock for the privilege of postponing his delivery of such stock from and to a specified date.

"Inasmuch as the vendor and purchaser stand in the same position after the continuation as if there had been no previous contract, the continuation may equally be effected between persons other than the parties to the previous contract, and this is frequently the case. Let us suppose that a 'bull account' exists in the particular stock with which we have to deal—that is, that the amount of stock bought for the settlement is greater than the buyers are prepared to take up (we may here premise that every bargain in the stock must be and is settled

on the account day); a person who has bought stock for which he is unable or unwilling to pay must then find some one who, for a consideration, is willing to stand in his place by taking up such stock at the making-up price, and holding it for a specified time, charging a rate of interest for the money employed, and holding the stock as security; the real buyer engaging, at the end of that time, to take possession of the stock, by repayment of the money.

"The continuation may, of course, be effected outside the stock exchange; but, for its more easy explanation, we will suppose that a purchaser has given his broker instructions to continue the stock for which he is liable to pay, and that the broker carries out the transaction with a member of the house. This carrying-over is, as we have seen, not necessarily effected with the dealer from whom the original purchase was made, though this is very generally the case; but the broker finds some dealer in this stock who has money to employ, or who is out of the stock, and agrees with him for the accommodation at the market rate. The broker then renders a contract to his client, showing the sale of his stock at the making-up price for the current account, and its repurchase for the next account at the same price, but with an addition representing the value of the money practically borrowed by his client, together with the monetary consideration, if any, for the accommodation; and in the case of registered securities, if the lender of the money is obliged to take them into his own name, this will include the cost of stamps and transfer fees, from the payment of which the client is *pro tempore* relieved. It is this difference between the price of sale for the current account and the actual buying price for the next account, which is called a '*contango*'; and *this*, as will be easily seen, *will be regulated partly by the nature of the security, partly by the value of money, and partly by the demand existing for such accommodation; and will also be affected by the individual credit of the person seeking the accommodation.*"

Dos Passos Stock Brokers, p. 270, note.

On the Chicago Stock Exchange this fee has no special name, but Mr. Wilkins says it is the compensation "or

charge for carrying the stock for another broker for another month." (Trans., p. 111.)

This carrying over assumes a variety of forms. To make even figures, we will suppose the purchaser of the 500 shares of Diamond Match for July account has agreed to pay Clews & Co. $221 per share, or $110,500. The interest on this amount of money, if borrowed for one month at 6 per cent. from a bank would be $552.50. We will suppose this buyer does not want to take and pay for this stock on the last day of July, and lay out $110,500 therefor, but does want to get a month's time, so as to have the stock delivered on the August delivery day instead of the July delivery day. For this accommodation, he will be willing to pay the seller, or anyone else, at least as much interest as he would have to pay at the bank for the use of that much money for one month. But if he went to the bank to get the money he would not only have to pay interest, but would have to put up the stock as collateral, which would frustrate his carrying over his trade. Any system by which he can get the postponement without being obliged to borrow that sum or take up the stock will greatly convenience him, and for this accommodation he is willing to pay. Experience in the trade has shown that such purchaser is willing to pay for this accommodation, which he can readily get on the exchange, very much higher interest than he would pay at the bank, even if he were able to borrow that much money at the bank. The carrying rate, or interest, charged at this time on the Stock Exchange, for carrying stocks a month, it seems, ran from $2 to $2.50 a share. A firm like Clews & Co., with plenty of capital, could afford to carry stocks over to get the high rate of interest buyers would pay for such accommodation, as Clews &

Co. could borrow money at the bank at the lowest rate. If the party to whom Clews & Co.'s brokers had sold it, whom we will call A, didn't want to pay for it on the July delivery day, but would pay interest at $2.50 per share, or even $2 a share, Clews & Co. could make money by letting him have the time and carry the trade—that is, not deliver the stock for another month.

But we will suppose, on the contrary, that Clews & Co.'s purchaser, whom we will call A, wanted the delivery of the stock on the July account day, then Clews & Co.'s Brokers might hunt up some third party, B, in the market, who had bought 500 shares of C, a fourth party, but didn't want to pay for it uhtil the next delivery day, then Clews & Co.'s brokers would buy of B at the market price his right to such 500 shares, get an order from B on C to deliver shares to A, and in turn sell back to B for August delivery 500 shares which were originally sold to A, at the market price, plus interest or carrying charges. In other words, with the consent of all parties and by this process of buying and selling, Clews & Co. could earn the carrying charges, or "contango," as our English friends call it, and substitute B for A in the new trade.

All this is so abstruse to the legal mind that even at this late day English jurists who refer to the practice of carrying over refer back to earlier cases, where it is sufficiently explained. *Vide In Re Overweg*, L. R. (1900), 1 Ch., Part .2, p. 211. But when it is explained it is all very simple.

To facilitate the carrying over of trades from the delivery day of one month to that of the following month, the rules and practices of the exchange provide, after the 25th of each month, for trading in what is known as

the "second account." From that date until the day before the end of the month, Wilkins calls stocks in the first account and also in the second account, the first account being the account of the current month, and the second account the account for the month following. This allows an interval of four or five days for the members so desiring to arrange for turning over their trades to the next month. On the day before the last of the month, or delivery day, the calling of the two accounts stops, and the call is made solely of the account for the following month. (Trans., p. 110.)

Clews & Co. sought to earn some carrying charges on their sales, and on the 25th of July, 1896, at 11:41 A. M., Clews & Co. in New York telegraphed to Schwartz, Dupee & Co. in Chicago, to see if they could not get somebody to pay 2½ per cent. carrying charges, or "contango," for carrying the July sale to August delivery. The dispatch is as follows:

"Change Diamond Match over to August account, at 2½%. If you can do it let us know at once.

(Signed) CLEWS."

Shortly thereafter, but on the same day, to-wit, at 11:48 A. M., Clews having evidently received a reply that his brokers could get 2½ per cent., sent another dispatch to Schwartz, Dupee & Co., as follows:

"You sent us the difference this morning at 2½. At what difference can you do it now?

(Signed) HENRY CLEWS & CO."

On the same day, at 11:58 A. M., Clews & Co. telegraphed to Schwartz, Dupee & Co., Chicago, as follows:

"Change the 500 at 2 cents or better.

(Signed) CLEWS."

(Trans., p. 103.)

The 2½ per cent. in the first dispatch of July 25th and

the 2 cents in the last dispatch of July 25th, above referred to, were not claims, nor differences in settlement of stocks, but, as Wilkins testifies, was interest, pure and simple, or carrying charges. The same is true of the figures 2¼, which appear in the second quoted dispatch, sent by Henry Clews & Co. to Schwartz, Dupee & Co. on July 25th. (Trans., p. 111.)

And right here is the mistake of fact that Judge Seaman made, upon which he based the opinion delivered in behalf of the United States Circuit Court of Appeals for the Seventh Circuit, that the transaction was a gambling transaction.

He thought the 2¼ was the settlement of the differences between the contract and market price of those July trades, and that the word "difference" in the dispatch of July 25th, at 11:48 A. M., referred to gambling differences; but, as we have explained, it is nothing of the kind, but is simply the "contango" that the buyer is willing to pay for carrying the trade over for another month. It differed in no way, as you see, from the charge the buyer would have to pay if he went to the bank and got the use of the money represented by the stock for thirty days. It depended in no way upon the price of the stock, and in no way represented or marked the difference between what the stock was originally contracted to be sold for and the market price at the date of the turning over, but was entirely dependent on the credit of the purchaser and the money market, which in the middle of the Bryan campaign of 1896 was very high.

Suppose I make a contract to sell a piece of real estate for $10,000, the deed to be delivered thirty days after the date of the contract, and to be paid for on delivery.

Before the delivery day for the deed, the purchaser comes to me and says: "I don't want to take that deed and pay that money for another thirty days. What will you charge me to extend the time?" I reply, "I will charge you $100." He accepts, pays the premium, and the time is extended. There is no element of gambling about such a transaction. And yet that is just what the Circuit Court of Appeals held was gambling.

It is not surprising, however, that that court entirely failed to grasp this transaction. For no question having been raised about it in the briefs, the counsel for complainants did not take the time to explain the transaction to the court as it is described by Wilkins in the evidence.

During the four or five days while the second account is being called the purchaser who desires to carry over his trade is enabled to arrange with other parties to stand in his shoes, or arrange with his seller for the latter to buy back from him at the purchase price and make a new sale at current price, plus the "contango." This new sale when made is announced on the call of the second account which Wilkins makes. This new sale for the current price, plus the premium or "contango," would then go into the Clearing House and the "contango" would be collected at once in the following manner: There would be added to the margins of ten points on the current price, additional margins equivalent to the "contango." This would be drawn out by the seller's broker for him, and the seller would thereby receive his carrying charges or "contango" at once. There can be no question made in this case as to whether Clews & Co. knew all about this, because it is the very thing they ordered their brokers to do.

Schwartz, Dupee & Co., on behalf of Clews & Co., carried out these later orders in the following manner: On July 25th they bought for Clews & Co. 500 shares of July stock of four different parties at 227, evidently the current price at that day, and did at once sell it back to the same parties at the same price, plus the $2 per share interest for the August account. See Schwartz, Dupee & Co.'s trades in Match stock for July 25. (Trans., p. 67.) The latter then made a report of the transaction by wire to Clews & Co. at New York at 12:11 P. M., as follow:

"Bought Diamond Match 227 for the account. Sold 500 229, account 2nd.

(Signed) SCHWARTZ, DUPEE & CO."

On July 27, 1896, at 8:55 A. M., Clews & Co. telegraphed Schwartz, Dupee & Co. as folows:

"Change 200 more Diamond Match 2 per cent. or better.

(Signed) CLEWS."

And on the same day at 10:53 A. M., Schwartz, Dupee & Co. made a similar "contango," by buying said shares for July account of Peters at 226¾, and selling them back to them at 229 for August account. (Trans., p. 70.) They made report of their performance of said order in the following dispatches sent to Clews & Co. The first dispatch announced that the change had been arranged for and is as follows:

"We changed 200 match at 2¼ difference. Will give you prices later.

SCHWARTZ, DUPEE & CO."

On the same day, at 10:55 A. M., Schwartz, Dupee & Co. telegraphed Clews that the turn-over had been completed, as follows:

"Bought 200 Match 226¾. Sold 200 2nd account, 229." (Trans., pp. 103-104.)

In this manner the whole 700 shares which Clews & Co. had sold on July 16 and 20 for the July account were on the 25th and 27th carried over to the second or August account. From these dates new and entirely different contracts from those entered into on July 16 and 20 were in force. The $2 a share on the 500 shares which was changed over on July 25, and the $2.25 on the 200 shares which was changed over on July 27, the court will kindly bear in mind, is simply interest or carrying charges. If it were the difference between the sale on July 16th of 500 shares and the current price on July 25th Clews & Co. would have to pay Jamieson 5⅞ points. In like manner on the 200 shares the buyer would be entitled to 5¼ points from Clews & Co. As Mr. Wilkins says regarding these premiums:

"It is what one broker who has 500 shares of stock that he is carrying for a customer, and that customer is not prepared to take it up, and he is perfectly willing to pay whatever anybody else who is on the other side of the market will do it for for carrying it for thirty days." (Trans., p. 111.)

All this is Greek unless properly explained, and is something none of us know anything about until it is explained. But it is all in the record, is easily understood, and would have been explained to the United States Circuit Court of Appeals for the Seventh Circuit if that court had asked for an explanation of the transactions. When the transaction is made plain, it is evident that a system by which a July seller may make a new trade with a July buyer, or with somebody substituted by him, providing for delivery in August instead of July, whereby the seller gets interest for carrying the other's trade, has none of the elements of dealing or settling in differences between the contract and market price, and in no way resembles gambling.

But the only evidence the Court of Appeals relied on to

support its claim that this transaction was a gambling contract is the evidence that relates to these charges for carrying over, and is refered to by the court in the following extract from its opinion:

"On its face the correspondence between the complainants and their brokers speaks of 'sales' of Diamond Match stock for July account, of inquiries for the 'difference' demanded to change to August account, and of changes then ordered and reported as made by allowing the 'difference.'" (Trans., p. 158.)

If the learned jurist who rendered the opinion of the Court of Appeals could have dined once or twice with Mr. Wilkins, and talked this matter over at length with him, as did Lord Mansfield dine with his special jurymen at Guild Hall, we fancy he would not have fallen into the error of confusing carrying charges with gambling in differences.

Permit us now to show you by the evidence how Schwartz, Dupee & Co. did carry out their principal's orders to sell for the account, and carry over to the August account. The actual sheet which Jamieson & Co. put into the clearing house on Monday, August 3, representing the trades made Saturday, August 1, is shown opposite page 76 of the transcript. On this blank, under the appropriate headings, and opposite the names of the members of the Stock Exchange who regularly deal in "the accounts," Jamieson & Co. set out in the respective columns the number of shares bought and sold by them under the abbreviated title of the stock dealt in, with the total footing at the bottom of the columns. The balance of these totals shows the number of shares they had bought of particular stock in excess of the number of shares of such stock sold by them, and *vice versa*. You will observe in the sheet referred to, Jamieson & Co. had bought 300

shares of West Chicago Street Railroad, and set the same off in the footing against 8,350 shares of the same stock sold by them. The net balance of 8,050 shares bought is what they held waiting to have the Clearing House clear the same. This the Clearing House would do by bringing Jamieson & Co. together with some other party or parties in the Clearing House who have 8,050 shares sold, so that such party would be the seller to Jamieson & Co., substituted thereby for the nine persons from whom, as appears by said sheet, Jamieson & Co. had bought said shares of West Chicago Street Railway stock. The latter are released when the stock is cleared. This process is repeated daily until delivery day. On the delivery day the ultimate buyer who is to take and pay for the stock of the party who is the seller in the Cleraing House, is first definitely ascertained. On the morning of August 3, 1896, Jamieson & Co., by this sheet, appear to have 1,150 shares of Diamond Match stock, bought of four different persons. These persons appear in the statement made to Jamieson & Co. by the Clearing House August 1, to have been substituted on Saturday, the 1st. (Trans., p. 76.) On that same day, August 1, Schwartz, Dupee & Co. was in the Clearing House short 1,150 shares of Diamond Match to three different parties; to two of them for 1,100 shares by substitution. (Trans., p. 77.) But on August 3 the Clearing House notified Jamieson & Co. that they had substituted Schwartz, Dupee & Co. as the seller of the 1,150 shares of Diamond Match of which Jamieson & Co. were the buyers (Trans., p. 95), and notified Schwartz, Dupee & Co. that they had substituted Jamieson & Co. as buyer of the 1,150 shares the former had sold (Trans., p. 106.), the settling price being $222 for Diamond Match.

Since Schwartz, Dupee & Co. carried over the 700 shares of Diamond Match stock for Clews & Co. on July 25 and 27, respectively, at 229, "Match" had been going down until it struck 222 on August 3. By the delivery day it might have gone down to less than 200. But as explained heretofore every day as the stock went down the buyer had to pay in enough money to make his margin good for the loss in value, and so as to keep in 10 points as margin; while as regularly the seller was permitted to take out his excess of margins. So that, in any event, when the delivery day came Schwartz, Dupee & Co. would have received then, or prior thereto, the full $229. During this decline Schwartz, Dupee & Co. were daily taking out of the Clearing House for Clews & Co. these margins. Exhibits 6 and 7, signed by the respective brokers, show that on August 3d Jamieson & Co. were to pay in $287.50, which Schwartz, Dupee & Co. were to draw for the benefit of their principals who had through them sold 1,150 shares of stock. (Trans., p. 118.) To aid in keeping track of these payments, the member in the Clearing House daily sets out in his sheet, under the column "paid," the amount of money, if any, which he should pay into the Clearing House, the equivalent of which the Clearing House in return permits the broker on the other side of the trade to take out. From Jamieson & Co.'s sheet of August 3, 1896, showing the transaction of August 1, 1896, and opposite page 76 of the transcript, we find Jamieson & Co. paid in to the Clearing House on the morning of August 3, 1896, $6,000. If the stocks had gone up, Jamieson & Co. would have set out on their sheet, under the heading "collect," and opposite the name of the broker with whom they had the contract,

the amount such broker should pay into the Clearing House to meet the amount Jamieson & Co. were entitled to draw out. All this guarantees the keeping up of margins, as required by the rules of the Clearing House and section 1 of article XVI of the constitution, *supra*. If this were not done, then if Diamond Match should go up from 221 to 234, the seller would have inadequate security for the advanced price.

As previously stated, when the member gets his sheet all made out, he daily sends his sheet to the Clearing House, with his check for the amount that he owes the Clearing House, or with a draft for the amount he is entitled to draw out of the Clearing House, as the sheet may show. The manager of the Clearing House, having all the sheets of the various members before him, checks them all up, and ascertains which members of the Exchange have stock of a specified corporation sold for the account in the Clearing House, and sets him off against a member or members whose sheets show that they have a similar total of similar stock bought. The stocks and margins are balanced. Wilkins then makes a summary of everybody's transactions and sends this summary, with a notice of substitution, to each member, in form similar to Exhibit 8. (Trans., p. 113.) This exhibit is the notice the Clearing House sent to Schwartz, Dupee & Co. August 3, 1896. (Trans., p. 106.)

After the Clearing Department of the Chicago Stock Exchange had by this notice notified Schwartz, Dupee &. Co. that Jamieson & Co. were substituted as a buyer for 1,150 shares of Diamond Match sold by Schwartz, Dupee & Co., each of the parties thus substituted sent cards to each other confirming these substitutions. (Trans., p. 118.) The exhibits 6 and 7 are copies of

the cards actually sent on August 3, 1896, by Jamieson & Co. and Schwartz, Dupee & Co. to each other confirming the substitution of Jamieson & Co. as buyers of the 1,150 Match. The afternoon of August 3, 1896, after these cards were exchanged by the parties, they were given to the manager of the Clearing House by the holders; and the sheets that were to be made out August 4th should have confirmed these cards. (Trans., p. 119.)

This was the process which had been carried on up to August 3d, and would have continued until delivery day, when the man found to be substituted in the Clearing House as purchaser would take the stock that was sold for that delivery day, and pay therefor. And out of the money then paid, or what had been drawn out before, Clews & Co., through their brokers, would have received every dollar of the contract price of $229 per share. (See transcript of Wilkins' testimony, pp. 107–114.)

But this is where Judge Grosscup made his mistake of fact, upon which his opinion was predicated. He supposed that Clews & Co., having ordered the sale at $229, would only get $222 per share out of their brokers' contract. But, as we have seen, by reason of their brokers doing just what they were ordered by Clews & Co. to do, to-wit, changing the sale in the July account over to the August account at 229, Clews & Co., through their brokers, were daily, as the stock went down, receiving a part of the $229 per share, and if Jamieson & Co. had not defaulted in the contract, Schwartz, Dupee & Co. would have received for Clews & Co. every dollar of the $229 per share. You will thus observe that from the 27th of July, and during the whole of August, had the Exchange remained open, a contract to deliver 700

shares of the stock should have been in force with some one and the price which Schwartz, Dupee & Co., acting for Clews & Co., were to get for the stock, remained the same. Whatever the price of the stock might be in the Clearing House, on the delivery day, Clews & Co. were to receive and would receive, in any event, at that date, or prior thereto, their selling price of $229 per share. The fact that the party who by this process of substitution was to receive the stock on delivery day may have been an entirely different party from the party who bought the stock when it first went into the account, is just as immaterial as the fact that the amount the last party substituted may have to pay is but $200 per share, while the first party was to pay $229 per share. The substitution of the new party by the Clearing House and the collection from intermediate parties of a part of the purchase price before the date for delivery and payment, is the precise contract which Clews & Co. ordered Schwartz, Dupee & Co. to enter into, when Clews & Co. gave their orders to the latter to sell "for the account." Such was the contract Schwartz, Dupee & Co. did enter into, and such was the contract Jamieson & Co. recognized had been entered into when they received their notice of substitution from the Clearing House on August 3, 1896. This substitution is precisely what section 5 of the rules of the Clearing House provides for. (Trans., p. 126.)

These rules are printed on the back of the Clearing House sheet of Jamieson & Co. for August 3, 1896, so that it is evident that they knew what kind of a contract was being worked out. But Jamieson was president of the Chicago Stock Exchange at that time, and certainly cannot contend that he did not know what he was doing, or what Schwartz, Dupee & Co. were do-

ing, or was not informed of the rules and reglations governing the Stock Exchange. For that matter, as we have shown, Schwartz, Dupee & Co. sent a card, confirming this substitution, to Jamieson & Co., and received back a similar card from Jamieson & Co., confirming the substitution on their part. (Trans., p. 113.)

Hence Jamieson & Co. cannot contend that they were not in privity with Schwartz, Dupee & Co., or Schwartz, Dupee & Co.'s undisclosed principal. There being then no change made by the working of the Clearing House in the amount Schwartz, Dupee & Co. were to get for Clews & Co. for their stock from the amount Clews & Co. ordered them to get, the foundation for Judge Grosscup's opinion crumbles away and the opinion falls to the ground. The answer to Judge Grosscup's question, "How can you claim that Schwartz, Dupee & Co. were authorized by Clews & Co. to accept Jamieson & Co. at $222, when they ordered their stock sold at $229?" is just this: Clews & Co. originally ordered the trades made "for the July account," they then ordered them carried over to August account if anybody would pay their charge for doing so. Using this technical term in their orders, Clews & Co. are bound to intend and contemplate the nescessary result of such orders. The result, accordiag to the rules governing trading in the account in the market in which they placed the orders, was that from the 25th and the 27th of July, when the 500 and 200 shares of stock respectively were turned over to the August account, and up to the 4th of August when the stock exchange closed, Schwartz, Dupee & Co., as the brokers of Clews & Co., were receiving out of the Clearing House, and were bound to receive, the

difference between $229 per share, the selling price, and the Clearing House price of that day. They received prior to the 4th of August, 1896, the difference between 229 and 222 per share, or seven points, which they held for Clews & Co., and upon the 3d of August, 1896, had an enforceable contract with Jamieson & Co., under which, if Jamieson & Co. had lived up to their contract, Clews & Co. would have received $222 per share, plus the $7 already received, or $229 per share, the price at which Schwartz, Dupee & Co. sold their stock.

This question would never have been raised by Judge Grosscup had he thoroughly understood the real nature of the transaction.

While counsel for Jamieson & Co. do not argue in support of the opinion of the Court of Appeals that this was a gambling contract save by *innuendo* (see brief for Jamieson & Co., p. 28 and p. 42), let us call your attention to the rules of the Chicago Stock Exchange, which show that gambling was not intended to result from transactions carried on under the rules.

Section 10 of the Clearing House rules provides that the same rule as to notice, time and place that govern defaults in other contracts made on the Chicago Stock Exchange, and outside of the Clearing House, shall apply to transactions for "the account."

Section 16 provides that in case of any failure of any member to meet his contract all stock bought in or sold out for him as "account" stock shall be settled outside of the Clearing House. (Trans., p. 127.)

Article XVI, Sec. 2, of the by-laws of the exchange

provides for the re-sale or re-purchase of all securities by an officer of the board, when there is a default in keeping up margins (Trans., p. 124), while article XIII provides for similar action where party fails to fulfill his contract when due.

Section 1 of article XV of the constitution provides:

"Any party who fails to comply with his contracts, or becomes insolvent, shall be suspended until he has settled with his creditors." (Trans., p. 122.)

Section 1 of article XVII prohibits any fictitious sales being made under penalty of suspension by the Governing Committee. (Trans., p. 122.)

Article XXIX of the constitution provides:

"Any member of this exchange who is interested in or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance, with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security without a *bona fide* purchase or sale of said commodity or security in a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act detrimental to the interest and welfare of the exchange." (Trans., p. 123.)

Could any clearer intention be manifested on the part of the Stock Exchange that its members should not deal in differences?

As before pointed out, article VII of the by-laws provides for the delivery of all cash securities before 1:30 P. M. (Trans., p. 123); while section 2 of the Clearing House rules provides that deliveries of stocks for "the account" shall be made on the last day of each month. (Trans., p. 125.)

There is no warant then for any suggestion that

the machinery provided for gambling in options or differences. And there is no evidence in the record that either party, much less both parties, intended to gamble when they went into these transactions. Indeed, the Court of Appeals in their opinion admit that. In fact, the whole opinion is predicated upon a woeful misunderstanding of the evidence and of what really took place. Under no circumstances by trading "for the account" could Clews & Co. get more than $229 per share—their contract price—and under no circumstances would they get less than $229 per share. The facts, when properly understood, demonstrate that there is no room in this case to discuss the question of gambling in differences.

It is true that the doors of the Chicago Stock Exchange were closed on the night of the 3rd of August, 1896, on account of the financial crisis in the City of Chicago. Jamieson was president of the board at this time, and probably was as much responsible for such action as anybody. It has not been intimated that he procured it to be done to affect his deals. Surely it will not be contended that Clews & Co. when they gave their orders, or Schwartz, Dupee & Co. when they executed them, intended that the doors of the exchange should be closed so that the transaction could not be carried out on the exchange. There is certainly no evidence that the transaction entered into in July for the second account, or August delivery, was not intended to be carried out just as we have described, or that the results we have described would not have followed. There is certainly no implication in the record that Clews & Co. did not intend to deliver the stock on the August delivery day.

This system of the Clearing House furnished a medium by which the brokers and their customers may transact their business of buying and selling for their principals securities for future delivery, cheaply, safely and expeditiously—safely, in that the Clearing House sees to it at all times that 10 per cent. margin is kept up by both sides to every contract. Cheaply, in that the customer by putting up a ten per cent. margin and a "contango" may thereby buy or sell or carry over stocks for future delivery which he could not otherwise do, without going to the bank and borrowing large sums of money.

After it is explained, it amounts to simply this: Clews & Co., trading "in the account" for August delivery on the Chicago Stock Exchange, sold for a price certain, through their Chicago brokers, who alone have access to the floor of said market, certain stocks to a buying broker of said exchange, who himself, or his substitute, who is ascertained through a system of substitution in the Clearing House, is to accept and pay the price for the stock on delivery day. If the stock does go down, the purchasing broker or his substitute is to daily pay into the Clearing House the amount of the decline, so that on or before the delivery of his stock on the settlement day, the seller gets the price at which he sold his stock. The fact that so far as the exchange is concerned, the deal was carried on in the broker's name, does not affect the right of the principal to enforce the contract he orders made.

In the case at bar, the $10 a share deposit in the Clearing House by both sides to the trade in question was kept good, although the stock went down, and at the closing hour on August 3 there was to the credit of this trade $14,000—$7,000 of which stood on that day to the

credit of Jamieson, and $7,000 stood to the credit of Schwartz, Dupee & Co. This $14,000 is held by these defendants, the Governing Committee of the Chicago Stock Exchange, to secure the performance of the contract represented by the cards and Clearing House sheets and notice of August 3, 1896.

If Clews & Co. should receive back from us the $7,000 they put in, then upon receiving from us the $7,000 Jamieson & Co. put in and $57,400 by decree from Jamieson & Co., with the $91,000 they got at the sale for $130 per share, they would receive just $229 per share for their 700 shares.

But we are not here for the purpose of saying that Clews & Co. did or did not pursue the right remedy after the Stock Exchange closed, and are ultimately entitled to the $14,000, nor are we here for the purpose of saying that ultimately Jamieson & Co. are entitled to the $14,000. But we do insist that we are entitled to have set aside the opinion of the United States Circuit Court of Appeals for the Seventh Circuit declaring these transactions to be gambling. And we do further insist that we are entitled to have set aside the opinion of the Jndge of the United States Circuit Court for the Northern District of Illinois, wherein he declares that there is no privity of contract between the principal who directs his broker to sell stocks for him on the Chicago Stock Exchange for the account, and the ultimate purchaser who, by the rules of the Exchange regulating the trading in the account, invoked by said principal by directing his sales to be so made, is found by said rules to be the purchaser of said stocks.

BRIEF.

I.

THE CONTRACT IS NOT OBNOXIOUS TO SECTIONS 130 AND 131 OF THE CRIMINAL CODE OF ILLINOIS PROHIBITING GAMBLING IN DIFFERENCES.

The construction given by the Illinois courts to this statute must be adopted in considering this Illinois contract.

Melchert v. *American Union Tel. Co.*, 11 Fed. R., 195.
Ward v. *Vosburgh*, 31 Fed. R., 15.

If the contract violates the statute the Stock Exchange is a gambling house *per se*, and all of its brokers are gamblers.

Irwin v. *Williar*, 110 U. S., 499.

But the order to Schwartz, Dupee & Co. at Chicago by their correspondents Clews & Co. in New York, directing them to sell in the Chicago market "*for the account*," commanded them to make the sale in a certain way. The only way known was to make the sale the way sales "for the account" were made at that market, which had to be made according to the rules and usages of the Chicago Stock Exchange governing trading "*for the account.*"

Bibb v. *Allen*, 149 U. S., 481.
Samuels v. *Oliver et al.*, 130 Ill., 79.

Irwin v. *Williar*, *supra*, is, therefore, distinguised, as in that case the principal did not direct the manner in

which the sale was made, and was ignorant of the usages of the market.

In this case the rules and usages of the Chicago Stock Exchange are a part of the contract.

Thorne et al. v. *Prentiss*, 83 Ill., 99.

The presumption as well as the proof is that Jamieson & Co., members of said exchange, contracted with reference to such rules and usages.

Corbett v. *Underwood*, 83 Ill., 324.
Perrin v. *Barker*, 126 Ill., 201.

The language employed by Clews & Co. in their order being technical, the court must look into the usages and customs of the trade for its interpretation.

Lyon & Co. v. *Culbertson & Blair Co.*, 83 Ill., 33–35.

The sale was for future delivery. But time contracts or options even as to time of delivery do not violate the Illinois statutes.

Wolcott v. *Heath*, 78 Ill., 433–437.
White v. *Barber*, 123 U. S., 392.
Pickering v. *Case*, 79 Ill., 330.
Cole et al. v. *Milmine*, 88 Ill., 349.
Pixley et al. v. *Boynton*, 79 Ill., 351.

Sections 130 and 131 of the Criminal Code of Illinois are interpreted in

Pearce v. *Foote*, 113 Ill., 228–234;
Union Nat'l Bk. v. *Carr*, 15 Fed. Rep., 438;
Tenney v. *Foot*, 95 Ill., 99;
Ibid., 4 Bradw. (Ill.), 594,

as applying solely to options to buy or sell with no intention of delivery but with an intention that the transaction shall be settled on differences between contract and market price.

Such contracts are undoubtedly prohibited by the Illinois statute.

Schneider v. *Turner*, 130 Ill., 128.
Pope v. *Hanke*, 155 Ill., 621.

But it must always appear that both parties had the intention that there should be no delivery, but merely a settlement of differences.

Jamieson v. *Wallace*, 167 Ill., 388, 396.
Soby v. *People*, 134 Ill., 71.
Edwards v. *Hoeffinghoff*, 38 Fed., 640.
Irwin v. *Williar*, 110 U. S., 499–508.

The burden is on the party claiming the contract to be illegal to show, not that one, but that *both parties* intended merely a settlement of differences and no delivery.

Pixley et al. v. *Boynton*, 79 Ill., 351.
Scanlan v. *Warren & Co.*, 169 Ill., 142.
Roundtree v. *Smith*, 108 U. S., 268.
Bibb v. *Allen*, 149 U. S., 492.

It is the duty of the court to uphold the contract unless it appears that it is an invalid one.

BREWER, J.—*Bungs* v. *Hornick*, 36 Fed. R., 97.

The cases cited by the Court of Appeals do not apply to the Clearing House system. A contract for stock deliverable in the future is valid though the seller has not

the stock or any means of getting it save to buy it in the market.

Porter v. *Viets*, 11 Fed. Cases, 291.
Irwin v. *Williar*, 110 U. S., 499–508.

The rules of the exchange forbid option trading or fictitious contracts or failures to deliver, and all connections with those engaged in trading in differences, under penalties of suspension or expulsion.

Article 15, section 1; article 17, section 1; and article 29 of the constitution.
Article 4 and article 17 of the by-laws (Transcript, pp. 122–124).
Section 10 of Clearing House rules (Transcript, p. 127).

They show the parties must have contemplated actual delivery.

The fact that margins are put up is of no significance.

Union National Bank v. *Carr*, 15 Fed. R., 438.
Edwards v. *Hoeffinghoff*, 38 Fed R., 635–639.
Hansen v. *Boyd*, 161 U. S., 397, 406.

Nor the fact material that the party defaulting in the putting up of margins may be sold out under the rules.

Bibb v. *Allen*, 149 U. S., 501,
Perin v. *Parker*, 126 Ill., 201, 211.

The substitution of purchasers through the Clearing House is in principle no different from "ringing out" trades. This court and the Illinois courts have invariably held that such substitutions do not make the contract a gambling contract.

Chicago Board of Trade—*Hansen* v. *Boyd*, 161 U. S., 397–407.

Chicago Board of Trade—*Clark* v. *Foss et al.*, 7 Biss., 540.

Chicago Board of Trade—*Ware* v. *Vosburgh*, 31 Fed. R., 15.

Baltimore Exchange—*Irwin* v. *Williar*, 110 U. S., 499.

New Orleans Cotton Exchange—*Lehman* v. *Feld*, 37 Fed. R., 852–855.

II.

CLEWS & CO. HAVING ORDERED THE SALE MADE IN A PARTICULAR WAY, AND IT HAVING BEEN MADE IN THAT WAY, CANNOT NOR CAN THE ULTIMATE PURCHASER THEREBY ASCERTAINED OBJECT THAT THE SELLING PRINCIPAL DID NOT INTEND THIS CONTRACT SHOULD BE CARRIED OUT IN THAT WAY, OR THAT THERE WAS NO PRIVITY BETWEEN THEM.

The trading "*for the account*" has long prevailed on the English Stock Exchange.

Dos Pasos, Stock Brokers, 273 *et seq.*

The Clearing House is but an extension of the ringing-up system, and is adopted from the London and New York Stock Exchanges.

6 Eng. & Am. Ency. Law, p. 166 (2d Ed.).

The London Stock Exchange clearing house explained.

Dos Pasos Stock Brokers, 278, foot note.

The genesis of the stock exchange clearing house and its establishment at Frankfort, Berlin, Hamburg and London, stated in

Political Science Quarterly, June, 1893, Vol. 8, No. 2, p. 252.

The principle of substitution by clearances and the privity of contract resulting therefrom has always been recognized by the Illinois courts.

Oldershaw v. *Knowles*, 4 Bradw. (Ill. App.), 63.

Oldershaw v. *Knowles*, 6 Bradw. (Ill. App.), 325.

Curtis v. *Wright*, 40 Ill. App., 491.

Pardridge v. *Cutler*, 68 Ill. App., 569, 575.

Reibe v. *Hellman*, 69 Ill. App. Ct., 19-22.

And the fact that the ultimate purchaser may have it at a different price matters not so long as the seller gets his price then or theretofore from his predecessor in the clearing house.

Oldershaw v. *Knowles*, 6 Bradw., 325-331.

The "account" or clearing house system is recognized in

Fowler et al v. *N. Y. Gold Exchange Bank*, 67 N. Y., 138.

National City Bank v. *N. Y. Gold Exchange Bank*, 101 N. Y., 595.

This system of trading in the account with substitution of buyers through rules of the Stock Exchange has met with the approval of the highest court of England.

Nickalls v. *Merry*, L. R., E. & I. App. Cases, Vol. 7, p. 530.

Cited with approval in

Irwin v. *Williar*, 110 U. S., 499.

Bibb v. *Allen*, 149 U. S., 490.

To the same effect, *vide*

Blackburn, J., in *Maxted* v. *Payne*, 6 L. R. E. 132, 147, 151, 166–180.

Hodgkinson v. *Kelly*, L. R., 6 Eq., 496.

III.

SPLITTING UP THE SALES WILL NOT DESTROY PRIVITY OF CONTRACT.

On the London Stock Exchange the broker splits up his tickets of purchases or sales and gives his principal split tickets for their amount of purchases or sales.

This does not destroy the privity of contract.

Sheppard v. *Murphy*, 16 W. R., 948.

Maxted v. *Payne*, *supra*.

Anderson & Co v. *Beard*, L. R. 1900, 2 Q. B., 260.

Geissel v. *Bristowe*, L. R., 3 Ch. App., 112.

But it does give the holder of such ticket, who was ignorant of the usage of the exchange, an opportunity to say such was not his contract, as in

Mollett v. *Robinson*, L. R., 7 H. of Lds., 802,

and in

Beckthusen et al. v. *Hamblet*, L. R. (1900), 2 Q. B., 19.

But this principle does not apply where both parties to the contract know the business and intend the very thing to be done that was done.

ARGUMENT.

I.

THE TRANSACTIONS IN QUESTION ARE NOT GAMBLING CONTRACTS.

The lower court in its opinion states:

"We are of opinion, however, that the transaction, as disclosed, clearly falls within the terms of the Illinois statute above cited, as interpreted by decisions of the Supreme Court of the state, and that neither the inquiry last suggested nor the sufficiency of the proof to show a wagering contract under the common law rule require decision to ascertain the invalidity of the contract thus disclosed." (Transcript, 160.)

The statute referred to is set out in the opinion and consists of sections 130-131 of the Criminal Code of Illinois (1st Starr & Curtis Ann. Stat., 2nd Ed., pp. 1295–1298). These sections are as follows:

"SEC. 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any such commodities, shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

"SEC. 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof shall be for any money, property or other valu-

able thing, won by any gaming or playing at cards, dice or other game or games, or * by betting on the side or hands of any person gaming, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, * or for the reimbursing or repaying any money or property knowingly lent or advanced at the time or place of such play or bet, to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be null and void and of no effect."

That part of section 131 within the stars was added in 1874. The remainder of the section was enacted in 1845 (Rev. Stat., 1845, p. 263, Sec. 1), and said section is almost a literal copy of the statute of 9 Anne, Chap. 14, Pl. 1-2 (1710).

Petillon v. *Hipple*, 90 Ill., 420.

Secton 130, on the contrary, was enacted for the first time in 1874, and since that time has been repeatedly construed by the Supreme Court of the State of Illinois. As the contract in question was made in Illinois, and was to be performed in Illinois, and the lower court declares that it is illegal as being obnoxious to the statutes of Illinois, this court would naturally turn to the decisions of the Illinois courts to ascertain whether the contract falls within the prohibitions of the statute.

Melchert v. *American Union Tel. Co.*, 11 Fed., 195.

If the transaction in question is illegal as being a gambling transaction, every broker who is a party to the transaction engages in gambling, and all may be indicted under the criminal code.

Irwin v. *Williar*, 110 U. S., 499.

Moreover, every broker who has carried on a transaction under the rules of the Stock Exchange has been engaged in gambling. All transactions carried on there under are void, and the Stock Exchange of Chicago is nothing but a gambling hell. Not only must this be true of the Stock Exchange of Chicago, but also of the Board of Trade of Chicago and all its members, to say nothing of the Stock Exchange of New York, the Exchanges of Boston, Philadelphia, New Orleans, St. Louis, Baltimore, and the Exchange in London. For the procedure under which the transaction in question was carried on is substantially similar to that under which property is bought and sold on the exchanges referred to. In London deliveries "for the account" are twice a month, on the New York Stock Exchange and on the Chicago Board of Trade the deliveries are once a month, otherwise the *modus operandi* is the same substantially in all these exchanges.

Not only has the Supreme Court of Illinois frequently considered the statute in question, but this court has often had occasion to consider it, and has always followed the decision of the Supreme Court of Illinois construing said statute.

This court has decided that where a principal sends an order to a broker engaged in an established market or trade for a deal in that trade, he confers authority upon the broker to deal according to any well-established usage in such market or trade, especially when such usage is known to the principal, and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal, provided the transaction in which the broker is employed

is legal in its character, and does not violate any rule of law, good morals or public policy.

Bibb v. *Allen*, 149 U. S., 481.

In the earlier case of *Irwin* v. *Williar*, 110 U. S., 499, the judgment of the court below in that case was reversed by this court, upon the point that the court permitted proof of the custom of the Chicago Board of Trade to justify the broker's action, when there was no evidence that the defendant below had knowledge of it. This court held that a custom which provided for exchange and substitution of contracts and payment of differences to effect it, working as it did a complete change in the nature of the seller's rights and obligations, could not be made without his assent, and that assent could be implied only in case of knowledge of the custom which it was claimed authorized it.

In this case Clews & Co. are New York brokers. They were the New York correspondents of Schwartz, Dupee & Co. The latter firm were their correspondents for business done on the Chicago Stock Exchange. They knew that Schwartz, Dupee & Co. in acting as their agents in the sale of stock would transact the business in the Chicago market through that exchange, and in accordance with its rules and regulations, and unless there is evidence of intention on their part to gamble, or the rules of the exchange provide for it, the transaction cannot be called a gambling transaction.

It is the rule in Illinois that all contracts for sale, made on a commercial exchange, by one member thereof with another member, with reference to the by-laws and rules of the exchange, must be construed as if those rules were expressly made part of the contract, and when made at

the exchange will be presumed to have been made with reference to those rules.

Thorne et al. v. *Prentiss*, 83 Ill., 99.

And where a person conversant with the rules and usages of the exchange employs a broker to make purchases for him on the exchange, such persons are presumed to contract with reference to these rules and usages.

Corbett v. *Underwood*, 83 Ill., 324.
Perrin v. *Barker*, 126 Ill., 201.

In *Samuels* v. *Oliver et al.*, 130 Ill., 79, it was said by our Supreme Court:

"It is a general rule that a person dealing at a particular market will be taken to have dealt according to the known and general custom and usage of that market, and if he employs another to act for him in buying and selling at such market, he will be held as intending that the business shall be conducted according to such general usage and custom of such market; and it has been held to be the rule, whether he in fact knows it is the custom or not."

To the same effect, *vide*

Bibb v. *Allen*, 149 U. S., 499.

The language employed in the dispatches by Clews & Co. to Schwartz, Dupree & Co. is highly technical, and without explanation from those familiar with the trade would be meaningless. Having been selected by Clews & Co., they are presumed to know its meaning. As was said by the Supreme Court of Illinois in *Lyon & Co.* v. *Culbertson & Blair Co.*, 83 Ill., 33–35:

"Inasmuch as the great mass of commercial business is transacted by men pressed by their affairs, and who are not in the habit, even if time would permit, of reducing their agreements to writing beyond a mere memorandum,

the courts are compelled to look into the usages of trade or business to learn the real intention of the parties."

When Clews & Co. instructed Schwartz, Dupee & Co. to sell "*for the account*" it instructed the latter to go on the Chicago Stock Exchange and make the "sale under the rules and regulations governing sales *for the account*" on that exchange. There can be no question then but that Clews & Co. adopted and intended to adopt such rules and regulations in making the trade in question. Neither can there can be any question but that Jamieson & Co., members of the exchange, knew what dealing "*for the account*" was, nor any doubt but that they were familiar with the rules governing the same when they went into the Clearing House and consented to be a buyer from the party which the Clearing House coupled them with from day to day as they continued in the Clearing House up to the 3rd of August, 1896. It follows that both sides to the contract made their contract knowingly with reference to the rules governing trading "*for the account*" on the Chicago Stock Exchange and are bound by those rules and the contract made thereunder, unless such contract is illegal.

There can be no claim made in this case that the contract in question violates the Illinois statute against gambling on the ground that it provides for a future delivery. It would not be obnoxious to the Illinois statute did it give to Clews the right to deliver any time during the month of August, instead of providing for delivery on the August delivery day.

As early as 1875, the year after section 130 of the Criminal Code was adopted, the Supreme Court of Illinois, in the case of *Wolcott* v. *Heath*, 78 Ill., 433–437, said:

"It is true, they were time contracts—that is, the seller had all of the month in which to deliver the grain; but the testimony of Wolcott is, they were *bona fide* contracts for the actual purchase of the grain. The only option the seller had was as to the time of delivery. The obligation was to deliver the grain at all events, but it was the seller's privilege or option to deliver it at any time before the closing of business on the last day of the month. Time contracts, made in good faith for the future delivery of grain or any other commodity, are not prohibited by the common law, nor any statute of this state, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of trade."

In *White* v. *Barber*, 123 U. S., 392, this court said, with relation to a case growing out of a transaction on the Chicago Board of Trade:

"A *bona fide* contract for the actual sale of grain, deliverable within a specified future month, the only option with which is the option in the seller to deliver it at any time within such month, is not a gambling contract within the meaning of section 130, chapter 38, of the Revised Statutes of Illinois."

Mr. Justice Blatchford used the following language in delivering the opinion of the court:

"The only question involved in the suit at law is as to the correctness of the charge to the jury in the particulars specially excepted to. The proper construction of the statute of Illinois, Sec. 130 of Chap. 38 of the Revised Statutes, was determined by the Supreme Court of Illinois in *Wolcott* v. *Heath*, 78 Ill., 433, in the passage from the opinion in that case quoted by the Circuit Court in its charge to the jury. According to that construction, the contracts for the sale of No. 2 spring wheat deliverable in July, 1882, made by Barber, were not void as gambling contracts, if they were *bona fide* for the actual sale of grain, and if the only option the seller had was as to the time of delivery, the obligation assumed by Barber being to deliver the grain at all

events, with the option only to deliver it at any time before the close of business on the last day of July, 1882."

The construction given by the Supreme Court of Illinois in the case just cited has never been changed by that court.

In *Pickering* v. *Cease*, 79 Ill., 330, the same language was employed. See, also, *Cole et al.* v. *Milmine*, 88 Ill., 349; *Pixley et al.* v. *Boynton*, 79 Ill., 351.

The true intent of section 130 has often been stated by the Illinois court.

In *Pearce* v. *Foote*, 113 Illinois, 228–234, the court said:

"As was said by this court in *Pixley* v. *Boynton*, 79 Ill., 351, the true idea of an option is what are called, in the peculiar language of the dealers, 'puts' and 'calls.' A 'put' is defined to be the privilege of delivering or not delivering the thing sold, and a 'call' is defined as the privilege of calling for or not calling for the thing bought. Optional contracts, in this sense, are usually settled by adjusting market values, as the party having the option may elect. It is simply a mode adopted for speculating in differences on the market value of grain or other commodities. It must have been in this sense the term 'option' is used in the statute. Such a contract is obviously fictitious, having none of the elements of good faith, as in a contract where both parties are bound, and is defined by statute as a gambling contract."

To same effect *vide Union Natl. Bank* v. *Carr*, 15 Federal R., 438.

In *Tenney et al.* v. *Foote*, 95 Ill., 99, the court approved of a decision by the Appellate Court (*Tenney* v. *Foote*, 4 Bradw., 594), in the following language:

"We may add in conclusion, we see no objection to the law as announced in the opinion adopted by the Ap-

pellate Court, and written by the Circuit judge who was formerly a distinguished member of this court."

The opinion referred to, 4 Bradwell, 594, adopts the opinion of Judge McAllister, Circuit judge, as its own. In that opinion, set out in 4 Bradw., 594, Judge McALLISTER states:

"There has been much difference of opinion as regards the nature of the contract prohibited. It must be, to fall within the prohibition, a contract to have to one's self, or give to another, an option to sell or buy some commodity at a future time. The word 'option' is one much in use on the Chicago Board of Trade, and probably has more than one sense given to it there. Boards of trade for dealing in the principal products of the country are of comparatively recent origin. The system seems to have been borrowed from, and, in its general features, modeled after, the more ancient institution known as the stock exchange, in which many phrases, words and terms of peculiar local meaning came into use; and it will be found that many of these have been carried into and adopted in boards of trade. Now, the word 'option' was in use long ago in the stock exchange, and seems to have acquired a definite meaning. As there used, it meant 'a stipulated privilege to a party in a time contract, of demanding its fulfillment on any day within the specified limit.' Webs. Dic., Ed. 1872, p. 917.

"In practice, on the stock exchange, it was often the intention of the parties that no stock should be delivered, but the transactions settled upon differences. This became common, and the English statute was aimed at its repression because it was, in effect, gambling. Our statute is directed against the same evil, and extends to transactions in grain and other commodities, as well as stocks. So that the word 'option' as used in the statute here, taken with the context, means a mere choice, right or privilege of selling or buying; and it is the contracting for such choice, right or privilege of selling or buying at a future time, any commodity the statute was intended to prohibit, as contradistinguished from an actual sale or purchase, with the intention of delivering and accepting the commodity specified."

It is well settled law in Illinois that all contracts for the purchase and sale of property, with the understanding or agreement of the parties (whether that agreement is expressed on the face of the contract or exists by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the difference between the contract and market prices, are mere wagers or gambling contracts and void.

Schneider v. *Turner*, 130 Ill., 128.
Pope v. *Hanke*, 155 Ill., 621.

But in order to invalidate the contract, it must appear that neither party has the intention to deliver the property, and that both parties have the intention of settling the differences only.

Jamieson v. *Wallace*, 167 Ill., 388, 396.
Soby v. *People*, 134 Ill., 71.
Edwards v. *Hoeffinghoff*, 38 Fed., 640.
Irwin v. *Williar*, 110 U. S., 499–508.

And the burden is on the party claiming that the transaction is illegal to show that it is, and if either party contracted in good faith he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other party.

Pixley et al. v. *Boynton*, 79 Ill., 351.
Scanlan v. *Warren & Co.*, 169 Ill., 142.

This was well illustrated in the case of

Roundtree v. *Smith*, 108 U. S., 268,

a case involving dealings between Roundtree and appellees, who were brokers on the Chicago Board of Trade. The suit was brought in the United States Circuit Court

for the Western District of Wisconsin, and defendants, who interposed a plea of gambling, admitted:

"I could not say that I had any understanding on the subject of the nature and character of the Board of Trade deals, whether the property was to be actually delivered or whether it was to be settled for."

This court held that the lower court was justified in directing the jury to find for the plaintiff.

In *Bibb* v. *Allen*, 141 U. S., 481, this case and others were considered by this court in the following language:

"It is further well settled that the burden of proof is upon the party who seeks to impeach such transaction by showing affirmatively their illegality. *Roundtree* v. *Smith*, 108 U. S., 269; *Dykers* v. *Townsend*, 24 N. Y., 57; *Irwin* . v. *Williar*, 110 U. S., 499, 507, 508. In this latter case the trial court charged the jury that 'the burden of showing that the parties were carrying on a wagering business and were not engaged in legitimate trade or speculation rests upon the defendant. On their face these transactions are legal, and the law does not, in the absence of proof, presume that the parties are gambling. A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property, which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding, if an actual transfer of property is contemplated. A transaction which, on its face, is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further and show this understanding was mutual—that both parties so understood the transaction. If, however, at the time of entering into a contract for a sale of personal property for future delivery it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager and nothing

more. * * * It is not sufficient for the defendant to prove that Irwin & Davis never understood that they were to deliver wheat in fulfillment of the sales made for them by the plaintiffs. The presumption is, that the plaintiffs expected Irwin & Davis to execute their contracts, expected them to deliver the amount of grain sold, and before you can find that the sales were gambling transactions and void, you must find from the proof that the plaintiffs knew or had reason to believe that Irwin & Davis contemplated nothing but a wagering transaction, and acted for them accordingly. * * * This court approved that charge as a correct statement of the law upon the subject of what constitutes a wagering contract."

Ibid, 149 U. S., 492.

In an earlier case, *Bangs* v. *Hornick*, 30 Fed. R., 97, counsel contended that it was the absolute duty of the court to denounce the transaction there under consideration unless it clearly appeared that it was a valid and honest one. But says Judge BREWER:

"I think the duty of the court is precisely the reverse, and that it is the duty of the court to uphold it unless it appears that it was an invalid and dishonest one."

Apply these principles to the case at bar.

There is no evidence in this case that Clews & Co. did not intend to deliver the stock that they contracted to sell, or that Jamieson & Co. did not intend to receive and pay for the same. If the plea of gambling had been set up by the defendants Jamieson & Co., such plea must have been overruled, unless it appeared to the satisfaction of the court that the method of procedure adopted by the Chicago Stock Exchange necessarily and of itself constituted gambling. Such opinion could only be predicated upon the rules of the clearing house.

The view of the lower court that the contract was a

gambling contract is, as we have shown, due largely to an entire misconception of what the dispatches referred to.

But the authorities cited by the lower court in no way impugn the clearing house system.

The case of *Irwin* v. *Williar*, 110 U. S., 499–508, cited by the court, holds that a contract for the sale of goods to be delivered at a future date is valid even though the seller has not the goods or any other means of getting them, than to go into the market and buy them.

In the other case cited by the lower court, *Embree* v. *Johnson*, 131 U. S., 336, "the evidence showed," said the court, "that the purchase or delivery of actual cotton was never contemplated, either by the defendant or the said Moody & Jamieson. It was understood between them that the settlement was to be made between said parties by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations of the market."

Ibid., 338.

Bibb v. *Allen*, 149 U. S., 481, cited by the court in its opinion, approved the charge of the lower court to the jury that there was no evidence in the case upon which a verdict for the defendant Bibb (who interposed a plea of gambling) could rest. The contract sued on was not a gambling contract, and was, therefore, valid. This court pointed out that the rules and regulations of the New York Cotton Exchange, which recognized no contracts except for the sale and purchase of cotton to be actually delivered, were germane, competent and relevant in show-

ing that the parties did intend an actual delivery of the cotton in question, saying:

"These rules and regulations imposed upon the seller the obligation to deliver the cotton sold, and upon the purchaser the obligation to receive it, except in certain specified cases, which have no application to the present case."

Article 15, section 1, of the constitution of the Chicago Stock Exchange provides as follows:

"Any member who fails to comply with his contracts, or who becomes insolvent, shall be suspended until he has settled with his creditors."

Article 17 of the same rule provides as follows:

"Fictitious Sales, Bids and Offers. Sec. 1. No fictitious sale shall be made. Any member contravening this section shall, upon conviction, be suspended by the Governing Committee."

Article 29 provides:

"Any member of this Exchange who is interested in, or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security without a bona fide purchase or sale of such commodity or security in a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the Exchange."

Article 4 of the by-laws provides:

"No sale of securites shall be made on which a deposit shall be offered as the limit of liability."

Article 17 of the by-laws provides:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by section 2 of the preceding article, employ an officer of the board

to close the same forthwith in the Exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under this rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting as well as that of the member giving the order shall be announced."

Section 2 of the clearing house rules provides:

"Deliveries of cash, stock or transactions for 'the account' shall be made on the last day of each month"

Section 10 of these rules provides:

"The same rules as to notice, time and place that govern defaults in other contracts shall apply to transactions in 'the account.'" (Trans., 121–127.)

These rules show that the Stock Exchange certainly contemplated delivery; they impose on the seller the obligation to deliver and upon the purchaser the obligation to receive the stock. The transaction itself shows that delivery was intended, and there is no hint in the proof that delivery was not intended by the parties.

Complaint certainly cannot be made that the rules of the Stock Exchange require parties to put up margins as security for the performance of their contracts. If the contract itself is lawful, the putting up of margins to cover losses which may occur from the fluctuations of prices and the final settlement of the transaction according to usages and rules of the exchange are entirely legitimate and proper.

Love, J., in *Union Natl. Bank* v. *Carr*, 15 Fed., 438.

Sage, J., in *Edwards* v. *Hoeffinghoff*, 38 Fed., 635–639.

An instruction to this effect was assumed to be correct by this court in

Hansen v. *Boyd*, 161 United States, 397–406.

The fact that the rules of the exchange allow the party to be sold out if he defaults in his margin in no way affects the validity of the transaction.

In *Bibb* v. *Allen*, *supra*, the cotton advanced beyond the price at which it was sold for delivery, and plaintiffs below, in pursuance of the rules and regulations of the New York Cotton Exchange, called upon Bibb & Co. to put up margins covering the advance in price, and were finally notified that if they did not put up margins they would be sold out. In pursuance of notice Allen & Co., plaintiffs below, went into the market and bought cotton "to cover" that which they had sold for account of Bibb & Co., and to make good their contracts. The court says:

"This they were required to do, both by the terms of their contracts with the parties to whom the cotton had been sold, and by the rules and regulations of the exchange of which they were members. If they had failed 'to cover' or comply with such contracts, the would have been liable to expulsion from the exchange. The cotton which they bought 'to cover' these contracts was purchased at the market price."

Ibid, 149 U. S., 501.

The court there held that the difference between that price and the price of bales previously sold and plaintiff's commissions constituted a claim against Bibb & Co., for which they were entitled to recover.

The court, in the same opinion, proceeds as follows:

"In the case of *Perin* v. *Parker*, 126 Illinois, 201, 211, where the transactions were similar to those in question here, it was said by the Supreme Court of Illinois:

'Parker, as agent for Perin and acting under his orders, sold the corn for Perin, and under the rules of the Board of Trade and the custom of the Chicago market he was personally bound to the purchasers on these contracts of sale. Parker and Perin were dealing with reference to such rules and such custom, with which they were both perfectly familiar. The rules of the Board of Trade provided that on time contracts purchasers should have the right to require of sellers 10 per cent. margins, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above said price. The price of corn had been rapidly advancing since the date of the sales. Parker either had deposited margins upon the contracts or was liable to be called on for the 10 per cent. and the additional margins by the persons to whom he had sold the corn. The evidence does not seem to disclose whether or not the purchasers had either received or called for margins. Even if they had not, yet there was an existing legal right in them to call on Parker for margins, and a legal liability upon the latter, within the next banking hour thereafter, to deposit the margins called for, and also, within that time, deposit with the secretary of the board, or the parties calling for such deposits, duplicate certificates of deposit, signed by the treasurer of the board or an authorized bank.''

Bibb v. *Allen*, 149 U. S., 481–501.

Nor does it support the opinion of the lower court to suggest that the method of substitution of purchasers will in any way invalidate or render illegal the contracts in question.

In *Hansen* v. *Boyd*, 161 U. S., 397–407, a suit was brought by Boyd and others, members of the Board of Trade of Chicago, against Hansen to recover the amount of payments alleged to have been made for account of defendant on account of purchase and sale of certain grain made for account of the defendant in the City of Chi-

cago. Hansen pleaded that the transactions in question were mere wagering contracts. Hansen was generally familiar with the manner in which business was done on the Board of Trade of Chicago, and testified that he supposed the transactions were to be conducted for him on the Board of Trade at Chicago; but claimed that at none of the interviews between himself and the plaintiff's agent was any allusion made to the Board of Trade or the rules of the Board of Trade; and also that it was not his intention to buy or sell any grain, but that he contemplated mere speculation on margins. Hansen became delinquent in furnishing margins, and May wheat was bought on his account at various prices. Later on, the brokers requested his consent to transfer the May to June wheat. Hansen gave no satisfactory response to this inquiry, and later on, in April, plaintiffs sold May wheat on which Mr. Hansen was in default for margins, at a given price, and the loss was charged against Hansen's account. Plaintiffs then bought June wheat and sent a memorandum notice of the May wheat and the purchase of the June wheat to Hansen, together with an account of the loss sustained on the May wheat; and failing to get settlement of the account, in June closed the open contracts on their books, by sale of June delivery wheat, and charging the loss and commissions against Hansen.

Among other instructions given for the plaintiff, and to which the defendant excepted, is the following:

"I might say to you here that if you find from the evidence that any of these contracts had been offset under the rules and regulations as prescribed by the Board of Trade of Chicago, offsets between persons and dealers connected with that board through whom these plaintiffs operated, that is not evidence of their illegality. The

mode of settlement of *bona fide* contracts for the sale of actual wheat does not affect the validity of the contract if the original intention was to purchase, receive, take and deliver the actual wheat at the time specified when the contracts were made."

But the court held that taken into consideration with other instructions offered there was no objection to this instruction. The court did hold, however, that the changing over of the May wheat into June for and on behalf of the defendant, without the consent of Hansen, was unauthorized and to that extent required a *remittitur;* but never suggested or dreamed of holding that "ringing out the trades" by off sets in any way made it a gambling transaction.

No intimation was made in *Irwin* v. *Williar*, *supra*, that "ringing out" the trades made the contract a gambling trade.

This same view of the validity of contracts on the Chicago Board of Trade was expressed at an early date in *Clark* v. *Foss et al.*, 7 Biss., 540.

That was a suit brought in the District Court for the Western District of Wisconsin by the assignee of a bankrupt to set aside certain promissory notes and a mortgage securing the same on the ground that the same were given to secure payments growing out of option contracts on the Chicago Board of Trade, which, it was claimed, were gambling transactions and contrary to the law of the State of Illinois. In that case it appears from the statement of facts by the court the outsider having failed to perform his contract, the brokers performed their contract by going upon the market and purchasing the wheat and corn; that as to 30,000 bushels of corn they made a delivery, and as to 8,000 they closed out

the deal in the manner before indicated by mutual offset and adjustment of differences: that this adjustment of differences is a mere matter of convenience to members of the board, and to their customers; that no person is under the least obligation to settle in that way; that dealers may, and often do, insist upon an actual delivery of the grain, and that settlement frequently saves their customers the cost of insurance and storage; that the object of forming these rings or clearing house is to close out the transactions, and get them off their books, and this is what they call ringing it out; but that it frequently cannot be done in that way, as if, for any reason, one whose assistance is essential to complete the circle prefers an actual delivery, in which case the ring is broken, then each must perform his contract by actual delivery of the grain.

The court held that settling by the "ringing up" process did not make it a gambling contract.

This case, according to the decision of Judge DYER in *Ward* v. *Vosburgh*, 31 Federal, 15, was appealed to the Circuit Court; and in an oral opinion delivered by DRUMMOND, Circuit judge, contracts involved in the foregoing case were sustained, and the decision of the District Court was affirmed.

In *Ward* v. *Vosburgh*, *supra*, Judge DYER pointed out that the Wisconsin statute was broader in its scope than the Illinois statute, and that hence the decision in the Wisconsin court did not apply to an Illinois transaction. Noting that *Barnard* v. *Bachhaus*, 52 Wis., 593, was based upon the Wisconsin statute and should not control an Illinois transaction, Judge DYER said:

"*Clark* v. *Foss*, in many of its prominent features, is on all fours with the case at bar, involving also the va-

lidity of settlements made by the so-called ringing up process, and the contracts out of which that case arose were sustained. * * * In *Clark* v. *Foss*, *supra*, the 'ringing up process' is commented upon, and shown to be in and of itself a legitimate method of adjusting differences in accordance with the rules of business prevailing in the clearing houses of the country.

"In *Williar* v. *Irwin*, *supra*, it was said by Judge GRESHAM in his charge to the jury:

"'The testimony tends to show that a general custom obtained among grain commission merchants in Balti more to the following effect: When one commission merchant, upon the order of a customer, sells to another commission merchant a quantity of grain for future delivery, and it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase the same *or a larger quantity* of the same kind of grain for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, that then, in such case, the two commission merchants meet together, and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts, and restoring any margins that may have been put up; and from that time forth the first commission merchant holds for the benefit of the customer for whom he sold the order or contract of the purchaser for whom he bought, so that the grain of the selling customer may, when delivered, be turned in on the order or contract of the purchasing customer, and that the commission merchant is held responsible as guarantor to his customer. The evidence also tends to show a custom obtained among commission merchants in Baltimore to the further effect that, though the second transaction may have been had with a different commission merchant from the one with which the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain for like delivery, so that the seller owes the wheat to the buyer to whom he sold and he to another who owes like wheat for like delivery to the first commission merchant,

that then, in such case, they settle by what they call a 'ring,' that is, they all reciprocally surrender or cancel their contracts, adjust differences in price between themselves, and surrender all margins that have been put up; that in all such cases the commission merchant substitutes the contract of another customer in place of that with the commission merchant whose contract has been canceled or surrendered; and that he guarantees to his customer the performance of the contract originally made in his behalf.'

"This is a very good statement of what the testimony in the case at bar shows transpired between the parties in the transactions here in question; and Judge Gresham held that the customs referred to were founded in commercial convenience, and that they were not in contravention of the law, [illegible] valid.

"The Supreme Court of the United States, in the 140 U. S., 499, in its review of the case above cited reversed the judgment of the court below upon another point, but did not question the correctness of Judge Gresham's ruling upon the validity of the method of business referred to, by which differences were adjusted.

"I must hold, therefore, that for want of adequate proof of an actual intention on the part of both the defendant and the parties with whom the plaintiff as his agent dealt, not to make real sales and purchases, or not to make actual deliveries of property sold and purchased, the contention that the contracts were mere gambling transactions is not established."

Ward v. *Vosburgh*, 31 Fed., 17.

In *Lehman* v. *Feld*, 37 Federal, 852 (Southern District of Mississippi), the practice of ringing out trades on the New Orleans Cotton Exchange was claimed to be evidence of a gambling transaction. Judge Hill, in denying this claim, referred to the rules of said exchange and said:

"These rules and regulations do not require the members purchasing or selling on the floor of the exchange to disclose the names of those for whom they sell

or purchase, but each member or firm making such sales or purchases must guaranty, and become personally bound for, the performance of all contracts so made, as though each was a principal, instead of an agent. The members of the exchange may at stated times, or whenever it is agreed upon between themselves, 'ring out' or 'close out' the said contracts of purchases or sales, by striking a balance, or setting off one contract against another, so as to substitute one for the other; the seller being still prepared and liable to deliver, and the purchaser to receive and pay for the same quantity of cotton, of the grade and at the price stipulated in the original contracts at the time stated for delivery; each being bound to the other upon the guaranty assumed, but on behalf of the unknown principals. These rules and regulations further provide that, to secure the performance of the contracts by each individual or firm so contracting a margin of $1 per bale shall be deposited at the time of the contract, and shall be renewed from time to time, as the rise or fall in price may require, according to the conditions prescribed in these rules and regulations, by which all of the members are governed. * * * The testimony of the plaintiffs is that they had purchased, or obtained upon adjustment of balances, as provided by the rules and regulations, other cotton contracts of the same grade, in the same quantity, to be delivered at the same time, and to be paid for at the same price, and held the same to replace those originally purchased, and it is these substituted contracts which were closed or sold out, resulting in the loss to recover which this suit is brought. * * *

"These rules and regulations recognize the right and duty of the members to settle balances with each other, as before stated, so that the cancellation of the original contracts was not a violation of the duty and obligation of the plaintiffs towards those for whom they dealt."

Ibid., 855.

But as counsel do not here erroneously contend that the transactions in question were gambling contracts, we will spend no further time on this point.

II.

CLEWS & CO. HAVING ORDERED THE SALE MADE IN A PARTICULAR WAY AND IT HAVING BEEN MADE IN THAT WAY, CANNOT, NOR CAN THE ULTIMATE PURCHASER THEREBY ASCERTAINED, OBJECT THAT THEY DID NOT INTEND THE CONTRACT TO BE CARRIED OUT IN THAT WAY OR THAT THERE WAS NO PRIVITY OF CONTRACT BETWEEN THEM.

The cases already cited, which involve the question of "ringing out" of trades on the various exchanges, establish the privity of contract between the seller and the parties substituted by the "ringing out" system as purchaser from his broker. The decisions were necessary, as in those cases the system was attacked on the ground that it was a part of a gambling system, under which contracts were cancelled through mutual set-offs. Before calling your attention to other cases where the contracts, performed by the ringing out of trades, were sought to be set aside or avoided on the ground of like privity, permit us to call your attention to the genesis of the Stock Exchange clearing house.

The reason we call attention to these decisions on ringing up trades is, that they have been thoroughly discussed by the Illinois courts, and universally sustained. But the ringing up of trades is only another name for the clearing house system, and it is fair to assume that a court that will sustain the substitution of a purchaser in the ringing up of trades will sustain the substitution of a purchaser by means of a *clearing house*.

Trading "for the account" is borrowed from the English Stock Exchange, and the system is fully ex-

plained in Dos Pasos on Stock Brokers and Stock Exchanges, page 273 *et seq.*

On the London Stock Exchange by far the most numerous transactions are those "for the account." There the account day, or, as we call it, delivery day, is twice a month. An outgrowth of trading "for the account" or contracting for a future delivery day and the ringing up of trades therein is the Stock Exchange clearing house. The author of the American and English Ency. of Law, 2d Edition, states:

"The utility and convenience of a clearing house system have led to its adoption in commercial transactions other than those between banks. In London there is a railroad clearing house, by means of which distribution is made among the different companies associated in the proceeds of through traffic over the several railways; and there has also been established in the same city a stock exchange clearing house which undertakes to adjust exchanges, consisting of moneys or moneys' demand, or quantities of stock; and in New York there appears to have been organized and operated, by a single banking corporation, a department known as the clearing house for the general clearance of contracts for the purchase and sale of gold."

Ibid, Vol. 6, p. 116.

Dos Pasos, in his work on Stock Brokers, *supra*, in describing the organization of the London Stock Exchange, speaks of the clearing house in the following terms:

"An important extension of the clearing principle was effected by the establishment in 1874 of the London Stock Exchange clearing house, which undertakes to clear, not sums of money, but quantities of stock. As stock brokers settle their transactions only once a fortnight, or in consols once a month, it naturally arises that in the intervals the same broker will usually have bought the same kind of stock for one client and sold it for another.

The very same stock may have passed through several different hands, and the same brokers may have had reciprocal dealings with each other. Instead then of actually making transfers of stock for each transaction and paying by checks which greatly swelled the business of the Lombard street clearing house on settling day, a plan has been arranged according to which each member of the clearing house prepares a statement of the net amount of each stock which he has to receive from or to deliver to each other member The manager of the house, after verifying these accounts, which should balance in the aggregate, directs the debtor members to transfer quantities of stock to the creditor members in such a way as to close all the transactions. * * * A separate clearing is, of course, to be made for each kind of stock. It is found that the quantities actually transferred do not exceed ten per cent. of the whole transactions cleared, and the checks drawn are diminished on settling days as much as ten millions sterling. (Jevon's Money and the Mechanism of Exchanges, pp. 281, 282.)"

Ibid, 278, foot note.

Mr. Alexander D. Noyes, in an article in the *Political Science Quarterly*, Vol. 8, No. 2, page 252, June, 1893, states that the system of a clearing house for stocks was adopted in the New York Stock Exchange in the early months of 1892, but had been in existence elsewhere for at least twenty-five years He says:

"Ordinarily in the first experiments they took the form of so-called 'ringing out' contracts in the same security. By this plan, if A sold B a given amount of one security, and if B had personally sold the same amount to C, the series of trades may be personally adjusted between the three traders, so that the only actual exchange required would be the transfer of the securities from A to C. Of course the number of traders in the series might be extended indefinitely, for the system did not require that the prices at which the trades were made should have been uniform."

The author notes that the first efficient establish-

ment of this kind in Europe was founded in the Handel's kammer at Frankfort, May, 1867; the Berlin Exchange adopted the system in 1869, Hamburg in 1870, Vienna in 1873 and London in 1876. But while the Paris Bourse has never established a regular clearing-house for stocks, the members by voluntary comparison of accounts by brokers' representatives, similar in its general workings to the system of bank clearances, attain the same ends.

Such being the genesis of the clearing house, we observe that it is simply an expansion of the ringing up system. The views of the Illinois courts, therefore, as to the validity and effectiveness of the ringing-up system, are especially important. For if those courts hold that privity of contract exists between C, who by the ringing out of the trades between himself, B and A becomes substituted as buyer from A instead of B, the original buyer, they must hold that it is immaterial whether C is not found until the delivery, so long as B or somebody else is the purchaser during all the intervening period.

The earliest and one of the most instructive of cases is that of *Oldershaw* v. *Knoles*. 4 App., 71. It happily illustrates how unmeaning to a court modern commercial contracts are without proof of customs of the market wherein the contract is to be performed, and how certain, definite and complete they turn out to be when the customs of the local market are fully explained. In that case Oldershaw, the broker on the Chicago Board of Trade, got this dispatch from Knoles, a resident of Jacksonville, Illinois:

"If April lard, ten ninety, buy two fifty."

"The court found this dispatch meant that if lard deliverable at such time in April as either might elect could

be purchased at prices specified, this broker was to buy for him 250 tierces. The broker filled the order and subsequently received two other orders which he filled, buying all told 1,000 tierces. With the last purchase Knoles remitted $700 to be used as margins on the purchase. The price declining rendered this sum too small for margins, and Oldershaw demanded more margins which appellee failed to advance, whereupon appellant sold all the purchases at a considerable loss, for which and his commissions he brought suit."

Upon the trial it was found that after the several purchases of lard by the plaintiffs for the defendants and before the sale of the same by the plaintiffs in the market the plaintiffs as to 750 tierces of lard settled the said purchases with the members of the Board of Trade, from whom the same were made, they in each case realizing a small profit, and made a settlement of the remaining 250 tierces, suffering a small loss.

Appellant, so the opinion states (p. 67), offered to prove that,

"as to the said purchase of lard made on behalf of appellee, the three settlements made prior to February 21st were effected in the following way, and not otherwise: that after making said purchases in the ordinary course of business upon the Board of Trade, it was found that appellants had sales made on account of other parties, customers of appellants, who were entirely responsible, for corresponding amounts of lard of the same delivery to the extent of 750 tierces; that such sales were made to said customers of appellants, either directly to the same parties from whom the purchases were made for appellee, or to some other person or persons who had sold lard to the parties from whom it had been purchased by appellants for appellee; that finding out this condition of facts after said purchases had been made on account of appellee, appellants, in accordance with the general custom and usage obtaining in such matters upon the Board of Trade, made the settlements as to the 750 tierces of lard with the parties from whom they had it purchased; that

by such settlements appellants obtained no interest whatever in the lard bought for appellee, but that the effect of such settlements in each case was merely to discharge the party from whom the lard had been purchased for appellee, by substituting in his stead another entirely responsible person for whose account appellants had the lard sold, leaving appellants responsible to such new party to carry out the contract of purchase, and making such new party liable to appellee, in all respects, to deliver the lard through appellants to him as the party from whom appellants had originally bought the lard for appellee,"

and the appellant also offered to prove that

"for a long time prior to making the settlements in question it had been the general custom and usage upon the Board of Trade to make settlements between the commission merchants upon mutual consent and for their mutual convenience, of the character described by the witnesses, in such cases as that at bar, where it is found that purchases and sales have been made of and to the same party directly or indirectly; that by such settlement the commission merchant substituted for his customer the responsibility of a party for whom he had previously made the sale for that of the party from whom he had made the purchase, and that such substitution was in accordance with the uniform custom and usage of dealers on the Board of Trade in such cases."

This offer was denied, and the Appellate Court of Illinois for the First District said:

"If the evidence offered had been admitted, it would have appeared that by a general and uniform custom upon the Board of Trade settlements of this character were made, and another responsible seller of the same commodity substituted for the one originally furnished to the customer. It must be deemed that this custom was within the meaning and intention of appellants and appellee; that appellee had it in view when he employed appellants to make such purchases for him, and that it entered into and formed a part of the contract between the parties.

The exceptions to the rule authorizing the admission

of evidence of custom or usages of trade are where such custom would vary the terms of an express contract, or contravene an established rule of law. As we have already seen, there was in this case no express contract between the parties, any of the terms of which were repugnant to the custom and usages sought to be proved. Nor are we able to perceive that such custom is in contravention of any established rule of law. It would have been entirely competent for these parties, by *express* agreement, to have provided for a substitution by the appellants of one vendor for another, precisely as was sought to be done in this case. Appellee might have expressly authorized appellant to buy for him the lard in question of one party, and to subsequently exchange such contract for that of any other responsible party they might select, provided only that some contract of a responsible seller in appellee's favor should all the time be kept open so as to secure the delivery of the lard at the time agreed upon. No rule of law would be contravened by such express contract, and precisely the same may be said of a contract implied from the circumstances and the usages of trade. If such provision would be valid in an express contract, it would be equally so in an implied contract."

* * *

In response to the contention that by virtue of the custom, a broker became personally interested in the business of his principal, and thus assumed a position adverse to those for whom he was employed to act, the court said:

"Appellants were engaged in a general business as commission merchants. In such business they were acting not merely for appellee, but doubtless for many other customers as well. The profits derived from the various settlements made by them under the rules of the Board of Trade belonged, not to themselves, but to their customers. A substitution for a purchase made of a third party of a like commodity previously or subsequently sold for another customer, rendering such other customer an account of the differences received or paid on settlement of the original deal, would not, we think, involve the commission merchants in any interest in the business adverse

to their principal. It is true, in all these transactions, they had an interest as nominal principals, and as actual guarantors to those for whom they dealt. Such interest, however, we think was not obnoxious to the principle of law sought to be invoked. * * * By these settlements they obtained no interest whatever in the lard bought for appellee; the effect was, in each case, to discharge the party from whom the lard had been purchased for appellee, by substituting in his stead another responsible vendor, for whose account appellants had already made an equivalent sale of lard, leaving appellants responsible to such new party to carry out the contract of purchase, and making such new party liable in all respects to deliver such lard to appellee, through appellants, in the place of the party from whom appellants had originally made the purchase for appellee."

Ibid., 4 Bradw. (Ills.), 72, 73.

The case went back for a new trial, and upon said trial the trial court allowed evidence of the custom to be introduced, but held the custom was void. Upon appeal to to the Appellate Court, again Judge Bailey, speaking for the court, recited the offer made upon the first trial, that said settlements were made in pursuance of

"a general custom and usage prevailing on the Board of Trade, by which, whenever it was ascertained that a commission merchant had made a contract of purchase, for future delivery, of a given quantity of a particular commodity, and had also made with the same or some other party a contract of sale of a like quantity of the same commodity for the same delivery, and (in case the two contracts were made with different parties) where it appeared that such parties had outstanding similar contracts with each other, either directly or through other dealers, so as to form a chain or ring of contracts for the purchase or sale of a given quantity of a particular commodity for the same delivery, a clearance or settlement was immediately effected between the parties, as between themselves, each paying or receiving the difference between the price fixed in his contract of purchase and that fixed by his contract

of sale; that such clearance or settlement was made by mutual consent of the commission merchants concerned, and for their mutual convenience, and that its effect upon the rights of their customers for whom contracts of sale or purchase for future delivery had been made, was to merely substitute in case of a purchasing customer the contract of another customer for whom the merchant had already made a sale, in place of the contract of the third party from whom he had made the purchase in the first instance, and *vice versa*."

Oldershaw v. *Knoles*, 6 Bradw. (Ill. App.), 325-329.

The court after referring to its former opinion, as concluding the lower court said:

"But even if the validity of the custom or usage established by the evidence was an open question in this case, we are still of opinion that it is valid."

Ibid., 6 Bradw., 331.

You will observe that this "ringing out" is precisely what the clearing house does in the case at bar. Only in the clearing house of the exchange the "ringing out" is done every day until the final delivery day, the contract of sale being in force all the time with some one.

But it was urged in that case, as in this, that there could not be a subsisting contract, because in the ringing out the substituted contract to buy was not identical in price with the contract canceled. In the case at bar it was urged by Jamieson's counsel and by Judge Grosscup of the Circuit Court, that Clews & Co., having authorized a sale at 229, their brokers could make no contract with Jamieson & Co. at 222. (Rec., 94.) But Judge Bailey quickly disposed of that contention, as follows:

"It is urged, however, that even conceding the validity of the custom authorizing a commission merchant, on

making clearances or settlements with other members of the Board of Trade, to substitute with his customer in place of the contract canceled by the settlement another contract, identical in terms, previously made by him for another customer, the contracts sought to be substituted in the present case were not identical in point of price with the contracts canceled, and for that reason could not be so substituted.

"It should be observed that according to the custom in question a commission merchant can be a party to such clearance or settlement only when he appears in one contract as a purchaser and in another as a vendor of the same amount of a particular commodity for the same delivery. If he is dealing as a commission merchant solely and not on his own account, as appears to have been the case with the plaintiffs, he must have made a contract of purchase for one customer, and a contract for the sale of the same amount for the same or some other customer, both for the same delivery. The contract must necessarily be identical in terms in all respects except as to price. But the evidence shows that by the process of settlement this difference, if any exists, is provided for and compensated. For example: if a dealer has made for A, one of his customers, a contract to sell 5,000 bushels of wheat at $1 per bushel, and for B, another customer, a contract to purchase the same amount, at 95 cents per bushel, he collects on the settlement the difference between these two prices, and passes the same to the credit of A, thus reducing the amount. A will, therefore, be entitled to receive for his grain 95 cents per bushel, the precise amount B contracted to pay. The process of settlement merely releases the dealer from his liability to other members of the board, and brings together two of his customers, a seller and a buyer, and makes them parties to one contract."

Ibid., 6 Bradw., 331.

In the case at bar, every day after July 27th, Diamond Match was going down. Hence every day Schwartz, Dupee & Co. were taking out of the clearing house for Clews & Co., from the purchasers substituted, the differ-

ence between the price at which it was sold, or 229, and the clearing house price of that day, so that on August 3d, when the price struck 222, they had collected seven points. As Schwartz, Dupee & Co. were Clews & Co.'s agents, Clews & Co. got the money. In other words, if Jamieson & Co. had paid 222 on August 3d, Clews & Co., by Schwartz, Dupee & Co. taking down these margins, would have 229 in their pockets, the price at which they sold it. Clews & Co. were in no case to get less than 229 and in no case to get more than 229.

In *Curtis* v. *Wright*, 40 Illinois Appellate, 491, the court followed the decision in the Oldershaw case, and held that it was no error for the lower court to refuse to give an instruction to the jury as follows:

"Unless you believe from the evidence that the defendant Curtis had competent knowledge of the rules, regulations and usages of the Board of Trade relating to settlement of contracts by off-sets, and relating to the exchange and substitution of contracts, then Henry Curtis was not and is not bound by such rules, regulations and usages; nor in that case could or did any substituted, exchanged or off-set contract, if any were made by the plaintiff for him, supplant or take the place of any original contracts, if any were made by the plaintiffs for him upon said Board of Trade."

In *Burdridge* v. *Cutler*, 68 Illinois Appellate, 569–575, the court followed the Oldershaw case, and said:

"It was shown that all through these dealings appellant's transactions were closed out by what is known as 'ringing up,' and this, it is said, was improper. 'Ringing up,' it appears, is nothing more or less than the setting-off of one grade against another—a thing which occurs in great cities in mercantile transactions as to 95 per cent. of the entire volume of business; that is to say, in great cities, on purchases and sales of merchandise to the extent of $100,000, in the settlement of the same, upon the average less than

$10,000 in money is actually paid, payments being made through checks upon bank, credit balances being set off against each other. The closing up of transactions on the Board of Trade for the purchase and sale of grain, by setting off one trade against another—in the parlance of the exchange, 'ringing up'—is necessarily no more illegal or improper than is the setting off of credit balances by merchants through checks on banks. True it is, as is urged by appellant, that thereby the identity of the transaction by him had upon the board was lost; that is to say, having purchased a thousand bushels of corn from A, and sold a thousand bushels of corn to B, if each transaction was closed out by a setting off of one against the other, he then had a contract for the delivery of grain with neither. Such result was for his convenience, and entailed upon him no loss, and such method of closing up transactions was a thing of which he was during all these years well aware, without making complaint thereof. *Oldershaw* v. *Knoles*, 4 Ill. App., 63; *Oldershaw* v. *Knoles*, 6 Ill. App., 325."

While this case of *Pardridge* v. *Cutler* was reversed, *Ibid.*, 168 Ill., 504, the reversal was on an entirely different point.

In *Riebe* v. *Hellman*, 69 Ill. App. Ct., 19-22, the court said:

"That in the purchase and sale of this wheat, that there was what is known as 'ringing up' does not make the transactions illegal. *Pardridge* v. *Cutler*, Frst Dist. Ill. Opinion filed February 1, 1897."

As already suggested, the clearing house system does not differ in principle from the system of "ringing up" trades. The statement of facts shows that, under the clearing house system, the buying broker, in effect, agrees that on the "delivery" day he, or some one else ascertained by the clearing house, will receive and pay for the stock sold. The seller agrees to accept such person so ascertained by the clearing house on "delivery" day as the buyer,

and deliver the stock to him. By trading "*for the account*" the buying and selling brokers agree, with every other member of the Stock Exchange who enters into said account, that the manager of the Stock Exchange, as the agent for all the parties, may, each day, clear the trade made in "*the account*," so that upon the expiration of the day following the sale, the stock sold will be deliverable to whoever, by the system, may appear on the sheet as being the purchaser in the clearing house for an equivalent amount of stock. On the next day similar action takes place, and upon the "delivery" day whoever is in the clearing house as the purchaser, for the number of shares contracted to be sold, stands ready and is obliged by the rules of the Stock Exchange to take the shares of stocks from the broker of the seller first spoken of. Margins are kept up in the meantime, and the daily difference between the selling price and the clearing house price is paid in from day to day by the purchaser or the seller, as the stock may decline or rise in value, so that the margins deposited may always be kept intact at $10 per share. The transaction in inself is equivalent to broker A, employed by the outsider to sell, saying to broker B, with whom he makes a contract, and to all other members of the Chicago Stock Exchange who go into the clearing house: "I contract to sell to B and to whoever shall, through my agent, the manager of the clearing house, be substituted upon the 'account' day in the contract to buy shares of stock, equivalent to the shares of stock I have this day contracted to sell B." On the contray, the buying broker says to the selling broker, and to his undisclosed principal, in effect, "I will buy from you so many shares of stock for future delivery, but I retain the right to have my trades cleared in the clearing

house, and upon the 'account' day there will be ascertained by our mutual agent, the manager of the clearing house, myself or some one substituted in my place, who will take the stock so contracted to be bought by me."

The convenience of this system has been remarked upon and approved in *Fowler et al.* v. *New York Gold Exchange Bank*, 67 New York, 138.

The system is described in *National City Bank* v. *New York Gold Exchange Bank*, 101 New York, 595.

The objection that by this substitution of buyers and sellers there is no contract with any one, though specious, is really without merit, as shown in the Illinois cases above referred to.

The same objection was disposed of at an early date by the English courts. A case involving the practice on the London Stock Exchange, quite similar to the account system as carried on in the Chicago Stock Exchange, was considered by the House of Lords in 1875, in *Nickalls* v. *Merry*, L. R. E. & I. App. Cases, Vol. 7, p. 530. According to the then existing rules and usages of the London Stock Exchange, the outsider, through his broker, a member of the exchange, would sell to another broker, also a member of such exchange, shares of stock to be delivered on the account day. The buying broker on the day preceding the account day (usually called the name day), was bound to pass to the selling broker a ticket containing the name of the person or of several persons as the purchaser or purchasers of the said shares, or he might, if he pleased, pass his own name as such purchaser, in which latter case only would he have bound himself to take the shares. Until the name day it was not seen who might stand ultimately, either as purchaser or

seller, or, in other words, who might be the person to transfer or take the shares. Until then the buying broker may have had a great many transactions, both buying and selling, with the same brokers, or with various brokers. On the name day, in the case supposed, if the buying broker, having purchased, had sold again, a ticket containing the name of the person to whom the shares were to be tranferred would have been issued by and passed on from the ultimate buying broker to his seller, and so on through the hands of the other intermediate sellers and buyers of stock, who had dealt in the shares, until it reached the hands of the original selling broker. In this way it sometimes happened that the same ticket passed through the same parties' hands several times in fulfillment of bargains made with other members. The original selling broker was not bound to deliver and transfer shares to the ultimate purchasing broker until the expiration of ten days after the account day. During this interval he might object to the parties named by his buyer, and a committee of the Stock Exchange would decide as to the validity of any such objection, and might require another name to be given, in case they considered it right to do so; but after the lapse of these ten days the selling broker was required to deliver the certificate and transfers of shares to such ultimate purchasing broker.

Speaking of the sale thus made Lord Chelmsford said:

"The contract upon which the question arose, having been made between a broker and a jobber, members of the stock exchange, the usage of that body entered into and to a certain extent determines and governs the nature and effect of the contract. The jobber's (the purchasing broker) contract thorefore is of this description. It is at first a temporary and conditional

contract, but it becomes absolute upon his failure to furnish by the name day the name of a person capable and willing to become the transferee of the shares, so that the seller, by executing a transfer, may make with him a new contract in substitution of the original one with the jobber."

Lord Hatherly said:

"It has been contended on the part of the appellant, and so far justly contended, that the person employing a broker on the Stock Exchange to sell shares in that market, which has been established for the sale of shares, must be taken to conform with the usages and customs which have been established by the parties in that market as among themselves, for the general conduct of their business. It must be supposed to intend that his share shall be sold subject to that condition. So far, well and good. But then, what is the condition? Nobody denies that when a broker sells shares for his principal (who is what is called an 'outsider' and who has employed him to sell the shares) to anybody in the market, there is a good and valid contract made between these parties—that is to say, between the person whose shares are to be sold and the broker who purchases those shares for the vendor's broker. There is a contract, and that contract must be fulfilled. It must be a contract with somebody, and it must be fulfilled, in the first instance, by him who made it—that is to say, by the jobber. But there is open to the jobber, according to the practice and custom of the Stock Exchange (and there it is that the practice of the Stock Exchange comes in) the option of saying, I will give to you the name of a person who has authorized me to give his name instead of my own, and who will perform my contract for me, and when that name is given to you who shall have an opportunity of inquiring into that person's name (ten days I think is the time allowed for such inquiry), and you shall thereby satisfy yourself that the person I name is a person whom I may reasonably propose to you as the person who is to perform the contract which I have with your broker; after which, the contract which I have made will cease, and if he is a person whom it is reasonable for

me to substitute for myself as contracting with you, you shall have the means to satisfy yourself as to the responsibility in point of means to fulfill that engagement which I have taken upon myself. NOW THESE ARE VERY REASONABLE RULES OF THE STOCK EXCHANGE, and nobody can find fault with them, for the very enunciation of them implies that there is a contract to be tranferred, and that there is a person to whom that contract is to be transferred and can be transferred." *Ibid*, p. 546–547.

In the *Nickalls* case, just as in the account system, a contract was entered into by the selling broker with the ultimate buyer, whereby, through the instrumentality of certain other persons, whoever they may be, certain shares were to be sold or bought, and an undertaking was entered into to complete the contract with the person, whoever he might be, who was found under the account system to be the buyer on delivery day. It is immaterial to the seller to whom the shares are to be delivered, as it is to the first buyer, to know from whence they came. The fact that under the English system the name presented on name day must be acceptable to the seller, or, he demurring, to the Stock Exchange committee, does not affect the principle which governs the validity of such a transaction.

The Nickalls case is cited with approval by the Supreme Court of the United States in

Irwin v. *Williar*, 110 U. S., 499, and
Bibb v. *Allen*, 149 U. S., 490.

Maxted v. *Payne*, Law Rep., 6 L. R. Exch., 132, cited in petitioners' brief, is to the same effect.

In that case Blackburn, J., the author of Blackburn on Sales, in speaking of a similar contract, said:

"The undisclosed principals of those two members can,

at law, enforce, and are by law liable for, the contracts made by their agents."

Ibid., 147.

At page 151 he says:

"What difference does it make that the contract was on the Stock Exchange *for the account*. I have no doubt that the plaintiff, now seeking to enforce the contract made on his behalf, must take the contract as it really was, incorporating in it all the usages relative to said contracts, and the questions—what are those usages—what is their extent and what do they mean—are all questions of fact to be ascertained by evidence, but when once they are ascertained the legal effect of the customs upon the contract is a question of law."

He continues:

"There may be a great many intervening members between the two. The ticket, which the member A holds at the name day, bearing on it the name Z as the original issuer and which contains the name and address of one, a member or non-member, or the person into whose name Z intends the shares to be transferred, may have passed through the hands of as many members as might be designated by all the intervening letters of the alphabet, and may have been split a dozen times, and the issuing member may have been a jobber or broker, and the intervening members may have been brokers or jobbers, or both, and the holding member may be either a broker or jobber—still the result will be that the holder of that ticket is brought in contact with the issuer of it, and both must necessarily be members of the Stock Exchange."

He concludes his instructive opinion as follows:

"If the parties entering into this contract were agents (as Sandiman & Co. were for Mexted; Foster & Co. were for Spry), I apprehend their principals, though undisclosed and unknown, would be parties to the contract, and would be subject to the same liability as their agents, and entitled to have the same benefit of the contract. * * * And the convenience of it, in the

present case, may be made clear by supposing that A, holding a ticket issued by Z, which had passed through the hands of members, whom we may designate by the other letters of the alphabet, and that Z, without any valid reason, refused to pay. If there is no privity between A and Z it will be necessary, in order to enforce the performance of Z's duty, for A to sue B, B to sue C, and so on until, ultimately, Y will sue Z before Z, at the expense of twenty-five law suits, be compelled to do his duty by a process very troublesome and costly; whilst if there is a privity between A and Z, it may be enforced by a direct suit between those parties; and this imposes no hardship upon the issuer of the ticket, as it only places him in the same position, relatively, to the holder of it in which he would have stood towards his first vendor, if that vendor had never passed away the ticket but had himself delivered the shares direct. * * * It seems to me that the ultimate novation of the customer must be between the members, and when it takes place it puts the member issuing the ticket under an obligation to fulfill exactly that duty which, before that novation, he would have had to fulfill to the member with whom he had originally contracted." *Ibid.*, pages 166 and 180.

In *Hodgkinson* v. *Kelly*, L. R., 6 Eq., 496, Romilly, M. R., said:

"It is in my opinion an engagement entered into by A on one side and E on the other that, through the instrumentality of certain other persons, whoever they may be, certain shares shall be sold and bought, and they undertake to complete the contract with the person, whoever he may be, who buys on one hand and sells on the other."

To same effect *vide Sheppard* v. *Murphy*, 16 W. R., 94[illegible].

Grissel v. *Bristowe*, L. R., 3. Ch. App., 112.

These authorities conclusively establish a privity of contract between Clews & Co. and Jamieson & Co. The facts in the case at bar leave no room for the application of the doctrine announced by this court in *Irwin* v. *Williar*, 110 U. S., 499, that the usage of the Stock Exchange would not be binding upon an outsider unless he knew of such usage. The custom is certainly binding upon Jamieson & Co. They were members of the exchange. It was certainly known by Clews & Co. and binding upon them, because Clews & Co. expressly directed that this trade should be made "*for the account*," employing the technical terms to describe the transaction, which the rules above referred to provide the machinery for carrying out.

III.

SPLITTING UP THE SALES DID NOT DESTROY PRIVITY OF CONTRACT.

Notwithstanding the distinction between the case of *Irwin* v. *Williar*, *supra*, and the case at bar, counsel for our co-respondents seek to avoid that distinction by citing *Beckhusen et al.* v. *Hamblet*, 2 L. R. (1900), Q. B. Div., 18, and claim the facts in this case are similar to the facts in that case. The principle—but not all that was said in the opinion of the Beckhusen case is similar to the principle announced in *Irwin* v. *Williar*, *supra*. If the case at bar is not distinguishable from the latter, it is unnecessary to cite the English case.

Counsel claim that inasmuch as Clews & Co., on the 27th of July, ordered Schwartz, Dupee & Co. to change 200 of Diamond Match to August account at 2 per cent. or better, they did not authorize their brokers to change

more than 200 shares, and it appearing, as they claim, that on that date Schwartz, Dupee & Co. changed 350 shares, 200 of these could not belong to Clews & Co., that such was not Clews & Co.'s contract, and hence there could be no privity between Clews & Co. and the parties who ultimately became substituted as buyers of said shares. The ground for claiming that Schwartz, Dupee & Co. changed over 350 shares, instead of 200 shares, is based upon the statement of the purchases and sales of Schwartz, Dupee & Co. on behalf of various customers, on July 27th. (Trans., p. 70.)

You will observe from that statement that on that day Schwartz, Dupee & Co. bought 350 shares of Match at 226¾, *for July account*, from broker R. A. Peters, the price at which they telegraphed to Clews & Co. that they had bought 200 Match. (Trans., p. 104.) You will also observe from that statement that they sold 350 of Match "*for the August account*" to R. A. Peters at 229, the price at which they wired Clews & Co. that they had sold the 200 shares. In doing this they followed the method for carrying over July trades to August account, that we have heretofore described, to-wit: by buying back for the July account, and selling for the August account, with the "contango" added, for the current price of the July account. There is no claim that they did not make this change over, and this evidence shows they did. The extra price of the sale for the August account above the purchase for the July account shows that this was a "carry-over" with Peters. The fact that there appears upon the statement of Schwartz, Dupee & Co.'s purchases and sales for July 27, a memorandum that Schwartz, Dupee & Co. had *sold* 350 *for July account* at 226¾ to R. A. Peters, and *bought* 350 shares at

229 "*for the August account*" from R. A. Peters, has nothing to do with the transaction we are now considering. It merely indicates that Schwartz, Dupee & Co. had some buyer in the July account who wanted his account carried over to the August account, and therefore had Schwartz, Dupee & Co. sell 350 for the July account at 226¾ to Peters, and buy back for the August account the same 350 shares from Peters at 229. These figures show that this was a carry over and included the "contango." We explain this in order to eliminate all additional occasion for misunderstanding the facts. But, say counsel for our co-respondents, what right had Schwartz, Dupee & Co., after buying from Peters 350 shares for the July account at 226¾ and selling him said 350 shares for the August account at 229, to claim that they had carried over 200 shares of the transaction for Clews & Co.? Answering this inquiry in the negative, the counsel argue that there must necessarily be a lack of privity. But in making this argument counsel lose sight entirely of the basic principle of *Mollett* v. *Robinson*, L. R., 7 H. of L., 802, the authority for the Beckhusen case.

In *Beckhusen* v. *Hamblet*, *supra*, Kennedy, J., who rendered the judgment, held, upon the authority of *Mollett* v. *Robinson*, *supra*, that where the broker was ordered by his principal to carry over 210 Louisville shares, but bought in his own name from the plaintiffs for that account 360 Louisville shares, thereby lumping the orders of two clients in one contract of purchase in his own name, that that made the contract the broker's contract and not the contract of his clients. Kennedy, J., held that the transaction was one the real nature of which was absolutely different

from the contract his principal authorized him to make, and that, *even though the usage of the Stock Exchange* sanctioned it, unless the principal was acquainted with the usage of the Stock Exchange, which would authorize such departure, the principal could claim that there was no enforcible contract subsisting between him and the other party to the trade.

In this particular Kennedy, J., followed the doctrine of *Mollett* v. *Robinson*, *supra;* but Kennedy, J., said, in addition, that assuming that there was such a usage, and that the principal knew it and contracted with reference to it, "the usage cannot operate, in my judgment, so as to make a man liable upon a contract which is not in point of law his contract. It cannot create contractual rights between parties where none exist, according to legal pr nciples."

Beckhusen et al. v. *Hamblet*, L. R., 2 Q. B., p. 27.

To support this proposition Kennedy cited *Mollett* v. *Robinson*, *supra*, but the opinion he cited was one rendered by one of the judges when the case of *Mollett* v. *Robinson* was in the ~~Common Pleas Court~~ Exchequer (L. R., 7 C. P., p. 109), which opinion was not adopted by the House of Lords. The genesis of *Mollett* v. *Robinson*, *supra*, and what was decided by the House of Lords, is pointed out by Benjamin, in his work on Sales, in the following manner, to-wit:

"Plaintiffs, tallow brokers, were employed by the defendant to purchase fifty tons of tallow in the London market and had like orders from other purchasers. The plaintiffs bought, in their own names, without disclosing their principals, tallow enough for all the orders which they had received and divided it among the princi-

pals that employed them, sending to the defendant a bought note, signed by themselves as 'sworn brokers,' stating fifty tons to have been bought 'for his account,' with quality, price, etc., but no vendor's name given. There was no corresponding sold note delivered to anyone, and no such purchase as was represented in the bought note. Proof was given that the execution of the defendant's order in this manner was in accordance with the usage on the London market, *but the defendant was not aware of the usage*, and refused to accept the tallow when he learned how the business had been conducted. Held in the Common Pleas by Bovill, C. J., and Montague Smith, J., that the defendant was bound to accept; by Willes and Keating J. J., that usage could not be invoked to change the character of the contract, and that the broker could not make himself the principal in the sale, without the latter's consent, and there was no other principal than the plaintiffs. In the Exchequer Chamber, Kelly, C. B., Channel, B., and Blackburn, J., agreed in the opinion with Bovill, C. J., and Smith, J., while Mellor and Hannen, J. J., and Cleasby, B., were of the opposite opinion."

1 Benjamin on Sales, p. 257 (4th Am. Edition).

On appeal to the House of Lords, the judgment of the Court of Common Pleas and of the Exchequer Chamber were reversed. Of the judges summonsed by the House who had not previously given an opinion on the case, Brett and Grove, J. J., dissented from and Amphlett, J., supported the judgments.

In other words, six of the thirteen judges who heard the case at any time held for the plaintiffs and seven against.

What was said by the various judges who passed upon the case in the lower courts cannot be considered to be the adjudication in the case.

Mr. Benjamin states that what was settled by the House of Lords is the following:

"It is, now, therefore, settled law, that when the usage of trade set up is such as goes to alter the intrinsic character of the contract, as, e. g., in *Mollett* v. *Robinson*, by converting the broker employed to buy for his employer, into a principal to sell to him, such usage will not bind a principal who, *ignorant of its existence*, employs a broker to transact business for him on the particular market where it prevai s."

1 Benjamin on Sales, Sec. 240 (4th Am. edition).

In examining the statement of this case in the House of Lords it appears that the facts were found that the principal was ignorant of the custom, and it further appears that a part of the tallow was bought by the broker before, and a part was bought after, the order was received from his principal; that the suit was brought by the broker against the principal on account of the *principal's refusing* to recognize the contract made by the broker, on the ground that it was not the contract that was ordered. In the House of Lords, Lord Chelmsford, in delivering the opinion of the court, said:

"Of course, *if the appellant knew of the existence of the usage*, and chose to employ the respondents to act for him without any restriction upon them, *he might be taken to have authorized* the broker to act for him in conformity to such usage."

Robinson v. *Mollett*, L. R., 7 H. L., 832–836.

In the case of *Irwin* v. *Williar*, *supra*, this court in reviewing that case said that assent could *only* be implied from knowledge of the custom which it is claimed authorized it.

Irwin v. *Williar*, 110 U. S., 516.

Thereby recognizing that assent would be implied if knowledge of the custom was had by the principal.

In the late case of *Anderson* v. *Baird*, L. R. (1900), 2 Q. B., p. 260, where the broker carried over the same number of shares to the next account that they were ordered by their principal to carry, Matthews, J., held that the case of *Beckhusen et al.* v. *Hamblet*, *supra*, did not apply, and said:

"From the evidence before me, I myself, having regard to the course of business, cannot come to any other conclusion than that this contract was binding as between the plaintiff and defendants, and establishes the relation of seller and buyer respectively between them."

These cases all hold that there is privity of contract between the parties who deal in the account and that it is not because of a lack of privity of contract betwen the ultimate purchaser and selling broker's principal, that the contract could be repudiated by either. That it is only when the contract is different from the contract which the principal ordered the broker to enter into that it cannot be enforced; but if the contract is carried out in accordance with the usage which the principal was familiar with, his assent thereto is implied, and he as well as the other party to the trade is bound thereby.

Now, in the case at bar, as we have shown, Clews & Co. are presumed to know what trading "for the account" on the Chicago Stock Exchange is, when they ordered their brokers to so trade. They are presumed to know what "carrying over" on said Stock Exchange is when they ordered the carrying over to be made, the carrying over being but one of the minor details of trading "for the account." It follows, then, that whatever

phase the transaction took in pursuance of the regular trading "for the account" in accordance with the rules of the Chicago Stock Exchange, that very phase Clews & Co. intended their brokers should adopt. It appears from the explanation we have already given of the clearing house system of trading in the account on the Chicago Stock Exchange, that the principal of the broker intends that where the carrying out of the rules so work out, as is frequently the case, that there shall be substitutions in the Clearing House between selling and buying brokers, whereby a broker will be substituted as a purchaser for 200 shares, if you please, out of 350 shares sold by the selling broker, that the principal of said brokers shall have his contracts with such broker for the shares his broker has sold. In other words, it is the custom of the Stock Exchadge, and it is a part of the essence of the Clearing House system, which is the machinery through which the trading "for the account" is done, that the broker may at any time have more shares sold or more shares bought in his trades in the Clearing House than the order of any one given customer, but that such bought or sold shares shall, as between the principal and the other party to the contract, belong to said principal, or be owing from said principal as the case may be, as the substitution of the clearing house may determine. It follows that what Clews & Co. ordered done, that Clews & Co. and every one else are estopped from denying Clews & Co. are responsible for. In this case Jamieson & Co., the other party to the contract, was absolutely familiar with the rules of the clearing house, the senior member of said co-respondent's firm being the president of the Chicago

Stock Exchange at the time, and chairman of its governing committee. They cannot be heard to say that such was not the contract that they entered into. Indeed, our co-respondents have recognized that such was their understanding of their contract. On the day the Chicago Stock Exchange closed, Schwartz, Dupee & Co. were, by substitution, sellers to Jamieson & Co. of 1,150 shares of Diamond Match; but only 450 of this had been ordered by other parties than Clews & Co., Clews & Co. having ordered the sale of the remaining 700. It is obvious that the principals representing the excess over the 700 could not claim that they were entitled to recover damages for the 450 shares out of the 1,150, if Clews could not recover damages for 700 shares sold out of said 1,150. But as appears from the testimony of Mr. Walter Comstock, Schwartz, Dupee & Co. settled with Jamieson & Co. for the 450 shares embraced in the 1,150 shares, which had been substituted on August 31d, and said settlement did not include any settlement as to the 700 shares which Schwartz, Dupee & Co. sold for Clews & Co. (Trans., p. 141.)

In other words, the co-respondent to this suit interpreted this contract, with respect to the 450 shares, in the same manner that the plaintiffs in this case interpret this contract with respect to the remaining 700 shares, *i. e.*, as susceptible of division.

Again, a stipulation was entered into between Judge McConnell, representing our co-respondents, and Judge Davis, representing the plaintiffs, as follows:

"It is admitted that Schwartz, Dupee & Co. have no claim whatever of any kind or character against the $14,000, $7,000 of which was respectively contributed by Schwartz, Dupee & Co. and Jamieson & Co. to the

clearing house of the Chicago Stock Exchange." (Trans., p. 141.)

But it appears that there is $14,000 in our hands, $7,000 of which was contributed by Schwartz, Dupee & Co. When Jamieson & Co., through their counsel, admitted that Schwartz, Dupee & Co. had no claim to that fund, said admission operated either to destroy the fund, or to admit that it belonged to somebody else. Jamieson & Co. do not claim that the $7,000 put up by Schwartz, Dupee & Co. belong to them, and their stipulation is tantamount to admitting that it belongs to Clews & Co. Again, said trust fund was from time to time drawn against and made good by the parties right straight along, as the prices went up and down, Jamieson & Co. contributing $287.50 thereto on the 3rd of August.

Such stipulation, and such action by Jamieson & Co., serve to estop Jamieson & Co. from claiming the transaction was not the transaction of Clews & Co., and unquestionably, if it was the transaction of Clews & Co., then there was not only privity between Jamieson & Co. and Clews & Co., the undisclosed principal of Schwartz, Dupee & Co., but the former must be responsible for such breach of contract, if any, as the evidence shows they made to Clews & Co. alone.

For these reasons we urge that this court reverse the decision of the Court of Appeals, which holds that the transactions in question were gambling transactions, and also the decree of the United States Circuit Court, which holds that in the transactions involved there was no privity between Jamieson & Co. and Clews & Co., and to give such further instructions in regard to the payment

of the trust fund by these respondents as the equities of the case may suggest, and to this court may seem fit.

Respectfully submitted,

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FRANK E. LORD,
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JOHN H. HAMLINE,
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